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Supreme Court, U.S.
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No. 08-30

In The

Supreme Court of the United States

PETER P. JONITES, *et al.*,
Petitioners,

v.

EXELON CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can employees who are members of a labor union pursue a collective action under the Fair Labor Standards Act or a class action under state law in a judicial forum, despite a collective bargaining agreement that contains an arbitration clause, in light of this Court's holding in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), and consistent with *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007) *cert. granted sub nom. 14 Penn Plaza LLC. v. Pyett*, 128 S.Ct. 1223 (Feb. 19, 2008)?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners:

PETER P. JONITES, Individually and on behalf of all other similarly situated, Luis Abogado; Dan Absher; Aaron Ackerman; Joseph Adamovitz; Gerald Adams; Gregory Adams; Samuel Adams; James Agamy; Henry Aguayo; John A'Hearn; Robert Ahearn Jr.; William Aichele; Joseph Aikens; John Aister; Niles Akbar; Victor Alaniz; Alejandro Alba; Armando Alcantar; Lucio Aldana; Ryan Aldridge; Eva Alexander; Kenneth Alexander; Steven Alexander; Lance Alfaro; Mario Alfaro; Sheila Alger; Wilfredo Alicea; Chester Allen; Michael Allen; Lance Allison; Edward Alms, Jr.; Henry Alonso; Charles Alvarez; Joseph Alvarez; Richard Alvis; Anthony Amadio; John Anaya; Wendell Anders; Donald Andersen; Walter Andersen; Brian Anderson; David Anderson; David Anderson; James Anderson; Jeffrey Anderson; Kenneth Anderson; Mark Anderson; Paul Anderson; Robert Anderson; Terry Anderson; Terrence Andrews; Steven Angileri; Raymond Anthony; CindyAnthony-Biaggi; Peter Antkowiak; Cheryl Antone; George Aparo; Jon Appel; Bonnie Appleyard; Kenneth Aranda; Julius Araujo, Jr.; Donald Arcus; Cristina Arellano; Joseph Arenas; Albert Arends; Anthony Argentine; Anthony Aristodemo; Rene Arreguin; Juan Arriaga; Angel Arroyo; Daniel Arthur; Herminio Artuz, Jr.; Edward Ash; John Ashby; Donald Ashford, Jr.; Jed Ashley; Dean Ashton; Calvin Atkins; David Atkinson; Stanley

Augustyn; Susan Aurand; Daniel Austin; Daniel Austin; Michael Austin; Ray Austin; Richard Austin, Jr.; Sidney Avila; Antonio Aviles; Carmelo Aviles; Martin Ayala; James Babuskow; William Bagnara; Leslie Bailey; Richard Bailey; Sheila Bailey; Steven Bailey; Cedric Baker; James Baker; Wayne Baker; Linda Bakke; Paul Bakke; William Bakkila, Jr.; Jeffrey Balanda; Terry Baldocchi; Samuel Ballano; Don Ballard; Dale Ballinger; Ronald Balma; Richard Balthazor; Walter Banks; Robert Banks, Jr.; Eric Bannon; Frederick Bantrup, Jr.; Thomas Banwell; Joseph Bapple, Jr.; Peter Baraban; John Barajas, Sr.; Ronald Barbel; John Barber; Jose Barbosa; Lowvaire Barefield; Louis Barilla; Jerad Barker; Craig Barnes; John Baron; Belinda Barr; Willie Barr; Daniel Barrie; Santiago Barrientos, Jr.; Thomas Barrow; Norman Barton; Brian Battisfore; David Bauer; Richard Baugh; Keith Baumgartner; Jose Bayon; Joy Beach; Zachary Beasley; Robert Beatty; Tammy Beaudoin; Joshua Beck; Timothy Beck; Bruce Becker; George Becker; James Becker; Mark Becker; Peter Becker; James Bednar; Reid Behnke; Herbert Behrens; Jo Beiler; Jeffrey Belknap; Benjamin Bell; Brandon Bell; Doris Bell; Gail Bell; Margaret Bell; Michael Bell; Andrew Bellino; Ryan Benkowski; Peter Benning; Wayne Bergmann; Martin Bergmark; Joseph Bertino Jr; Robert Best; Gary Bettega; Darrel Betts; William Betz; Robert Biaggi; Kenneth Bialczak, Jr.; Donald Bianchi; Richard Bicek; Bruce Bicker; Ronald Bickhaus; Steven Bielecki; Stanley Biezychudek; Linas Bildusas; John Bilek; Richard Bill; Carl Binkley; Lawrence Binns, Jr.; David Birdsley; Kevin Birge; Susan Bishop; Michael Blaha; Eugene Blais, Jr.; Bradley Blake; Michael Blasucci; Thomas Blatner; David Blazek; Tamara Blecke; Laurie Bliznik; Stewart

Blomquist; Alvin Blue; Frederick Blunt; Jeffrey Board; Richard Bober, Jr.; Colette Bogdan; Edward Bogert, Jr.; Ronald Bogs; Lawrence Bolda; Walter Bolisenga, Jr.; Ronald Boloski; Gwen Bolster; Kelly Bond; Ronald Bonds; Alexander Bonivel; Bobby Bonngard; William Bontz; Bernice Booker; Steven Boone; Woodrow Boone; Ryan Bopes; Steven Borcherts; William Boseo; Thomas Boshela; Gregory Boudreau; Ellis Boughton; Alonzo Boulanger, Jr.; William Boulter; John Bouma; James Bowdry; Donald Boyd; Angela Boykin; Burnett Boykin; Joseph Bozek, Jr.; Gerard Brady; Thomas Brady; Charles Brandal; Tyrone Brandy; James Brannigan; Thomas Braun; Tyler Breneman; Craig Brennan; John Brennan; Michael Brennan; Anthony Britton; David Brockman; Frederick Broecker; Thaddeus Bromir; Bruce Brooks; David Brooks; James Brooks; James Brooks; Donald Brown; Donald Brown; Garth Brown; Keith Brown; Lawrence Brown; Michael Brown; Rozell Brown; Stephen Brown; Vincent Brown; Yvonne Brown; Douglas Brownfield; Luther Brownridge; Kenneth Brueggeman; Jeffrey Brueggen; Beatriz Brulc; Paul Brunetti; Kevin Brunig; Kevin Brunson; Richard Bruton; Thomas Bryers; Steven Bryla; Gary Bubnack; Ronald Budzinski; Louis Buelens; Manuel Bueno; Cathy Buerth; William Buerth; R. Bujak; Charlene Bull; Brian Burbach; Ronald Burda; Jason E. Burdin; Joseph Burk, Jr.; Kevin Burke; Jeffrey Burlison; Robert Burns; Craig Burrell; Gary Burzawa; Delmar Bush; Charles Butcher; Jason Butcher; Anthony Butera; William Butkus; Geraldine Butler; Ronald Butler; Martin Buttkus; Sue Button; James Butts; Chester Byrd; Martin Byrne; Michael Byrnes; Clint Byther; Michael Cable; Geno Cabral; Emilio Cabrera, Jr.; Jeffrey Cadotte; Scott Calabrese; William Calabrese; David Calderone; Stanley Cales; Ryan

Callahan; Raymond Callahan, Jr.; Brian Calow; Salvatore Camerano; Joseph Camerino; Daniel Camic; Anthony Camiliere; Ronald Campbell; Timothy Campbell; Wilburn Campbell, Jr.; Raymond Campos; Herbert Cancel; Londell Cannon; William Cannon; John Cantone; Rodney Capes; Gary Capitan; Daniel Cardinal; Bryan Carlson; Aurelio Carmona; Leon Carpenter; Kevin Carroll; Michael Carroll; Willie Carson; Darrick Carter; Maria Caruana; Robert Caruso; Robert Carvelli; Joseph Casey; Yolanda Casillas; Bradley Casner; Charles Casper; Frank Castaneda; Steven Castellari; Michael Castillo; Luis Castro; Michael Cavanaugh; Victor Cavazos, Jr.; Jesus Ceballos; Rosa Ceballos; Joseph Cecala; Glenn Cederquist, Jr.; Joseph Centeno; Paula Centera; Robert Cermak; Peter Chalmers; John Chamberlain; Bradley Chambers; Elester Chandler; Dennis Chapman; John Chapman; Randall Chapman; Charles Chappetto; Raul Charo; Richard Chase; Harry Chatman; Ignacio Chavez; John Cheek; Ryan Cheeseman; Edward Chekytis; David Cherven; Gregg Chesnut; Duke Chew; Sopara Chor; Carl Christensen; Dale Christian; John Chrystal; Grzegorz Chudoba; Timothy Church; Paul Cinnamon, Jr.; Peter Cismesia; Jack Clark; Richard Clark, Jr.; Scott Clayton; John Cleeland; John Cleven; Brian Clevenger; Jonathan Clever; Ryan Cline; Jeffery Cobb; Robert Coghlan; David Coleman; Alejandro Collazo; Daniel Collins; Darren Collins; James Collins; Paul Collins; Sergio Colon; Herbert Colter; Robert Colvin; Devin Compton; Michael Conard; Scott Condon; Joseph Condreva; James Connell; Adam Conner; Michael Conner; James Conner, Jr.; Kevin Conners; Colleen Connolly; Patrick Connolly; Bryce Cook; Charles Cook; Joan Cook; Kenneth Cook; Lisa Cook; Thomas Cook; Peter

Cooney; Anthony Cooper; Barbara Cooper; Robert Corcoran; Jonathon Corey; Kevin Corey; James Corley; Carlos Cornejo; Alan Cornford; Robert Cornwell; Rick Correnti; Thomas Corrigan; Peter Cortesi; Thomas Corvo; Daniel Cosentino; Joseph Cosentino; Dennis Costanzo; Bradford Costello; John Costello; Carlos Cousino; Manuel Covarrubias, Jr.; Dale Cowan; Louis Coy, Jr.; Edward Coyne; George Craft, Jr.; Fred Craig; Douglas Crandall; Andrew Crank; Scott Cratsley; Robert Crawford; Thomas Crawley; Timothy Creamean; J. Cribbs, Jr.; Joseph Criscione; Robert Crock; Conrad Crosby; Gary Crothers; Mary Crowe; Dean Cruse; Bernardo Cruz; Gerardo Cruz; Wilbur Cruz; Rafael Cuesta; Daniel Culhane; Donald Cullinan; Ronnie Culver; Robert Cummings; Daniel Cummins; Dennis Curless; Thomas Curran; Florence Currie; Christopher Curtis; Michael Curtis; Russell Curtis; Curt Czarnik; Matthew Czubik; C. Daddio; Sean Dagens; James Dailey; Theodore Dailey; Michael Dalby; Michael Dalke; Frank Dallavalle; Timothy Dalporto; Debra Dalton; Donald Damato; William Damhoff; Linda Dangerfield; Dwayne Daniel; Lee Danson; Robert Danson; Vanessa D'Antone; David Dapkus; James Darin; Craig Dasto; Joseph Dause; Milton Davenport, Jr.; Bryan Davis; Christopher Davis; Darryl Davis; Debra Davis; Gary Davis; James Davis; Jeffrey Davis; Joseph Davis; Laura Davis; Marvin Davis; Michael Davis; Miles Davis; Monroe Davis; Ronald Davis; Robert Davis, Jr.; Willis Davison; Jason Day; Jeffrey Deangelis; Raymond Dearth; Steven Deboer; Daniel Debolt; Jerry Debruyne; Walter Debusk; Anthony Decero; James Defranco; Kenneth Deisenroth; Timothy Deisher; Carlos Dejesus; Gilbert Dejesus; William Deklerk; Robert Delcorno; Juan Delcon; James Delia; Marvin Deloney; Michael

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Estrada; Francis Evanish; Gerald Evans; Richard Evans; Danny Everett; David Fabbri; David Falduto; Donald Fane; Jeffrey Fane; Michael Fank; Don Farmer; Kevin Farmer; Nicholas Farr; Mark Farris; Roy Farris; Israel Favela; James Fazzini; Mary Fedderson; Patrick Feeley; David Feely; William Feisley; Eugene Fenwick; Gene Ferguson; Lawrence Ferguson; Michael Ferguson; Kerry Ferro; Daniel Fialko; Steven Ficker; Timothy Fields; Herbert Figueroa; Thaddeus Filipek; Thomas Filkowski; Brian Finlay; Joseph Fiorini; Mark Fischer; Jamie Fishbeck; Thomas Fisk; Stephen Fitzgerald; William Fitzgerald; Craig Fitzgibbon; Stanford Flennoy; Charles Fletcher; David Floberg; Frederick Flor; Albert Flores; Fernando Flores; Tomas Flores; Willebaldo Flores; Edward Florian; David Flowers; Cynthia Foley; Steven Foley; Edwin Foley, Jr.; Joshua Fonseca; Eugene Ford; Joseph Fordham; Thomas Fordham; Kurt Forest; Alan Forlenza; Anthony Fornelli; Donnell Forrest; Leonard Forster; Robert Forte; Sharon Fortier; Gary Fortin; Kenneth Fortner; Bernard Foster; Herbert Foster; Raymond Foster; Thomas Foster; Timothy Foulker; Roger Fox; Truvella Fox; Malcolm Fragoso; Martin Frain; Robert Franchetti; Richard Frantini; Albert Frazier; Gregory Freeman; John Freeman; Joseph Freeman; Kevin Freund; Scott Friedrichs; Michael Frost; Gerald Fuchs; Jesse Fulbright; Warren Fulfs; Fred Full; Gregory Fulton; John Funk; Richard Furmanek; William Gaa; Robert Gaides; Eddie Gaines; Richard Gaines; Gregory Galauner; Eric Galitz; Robin Gallagher; Michael Galles; Kenneth Gallo, Jr.; Andrew Galvan; Manuel Galvan, Jr.; James Gamble; Steven Gamez; Timothy Ganatos; Michael Garces, Sr.; Alberto Garcia; David Garcia; Enrique Garcia; Jeffery Garcia; John Garcia; Roberto Garcia; Scott Garretson; Jeffrey

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Gross; Herbert Grossich; Ryan Grover; David Groves, Jr.; Edward Gruze; Leo Grzywacz; Oscar Guajardo; Fred Guerra; Manuel Guerra; Hector Guerrero; Oscar Guerrero; Robert Guimon; James Guisinger; Eric Gullstrand; Daniel Gunnell; Barry Gunther; James Gunther; Derrick Gurschke; Anthony Gurske; Kevin Gustafson; Ralph Gutierrez; George Guy; Anna Guzman; Mario Guzman; Donald Hafenrichter; Tim Hager; Daniel Haggard; Bruce Hahn; David Haight; Glen Haisman; Alex Hajduk; Earl Hall; Steven Hall; Anton Halmel; John Haluzak; Timothy Hamburg; David Hamilton; Tyrone Hamilton; Floyd Hampton; Michael Hanlon; Timothy Hannon; Debra Hanson; Richard Hanson; Scott Hanson; Duryea Haralson; Patrick Haran; David Harcharik; Jeff Hardgrove; James Hardy; Duane Harkness; Stephen Harmatys; William Harrington; Billy Harris; Daphne Harris; David Harris; Keith Harris; Mary Harris; Ricky Harris; Robert Harris; Patrick Harrity; Thomas Hart; Brian Hartwig; Nichole Hartzfeld; Louis Harvey; James Harwick; Timothy Haseman; Mark Hasman; Scot Hasman; James Haubner; Brian Hauck; Casey Haun; Thomas Haupt; Tina Haupt; Robert Hawke; Lemar Hawkins; Steven Haws; Chris Hayes; John Hayes; Michael Hayes; Merlin Hays; Jeff Hayunga; Gregory Haze; Kenneth Hazel; Harry Headrick; Stephen Healy; Glorine Hearns Washington; John Hearon; Dennis Hecht; Kenneth Hedrick; Thomas Heiligenthal; Steve Heins; David Heintzelman; Cynthia Heinzl; Douglas Heithoff; Devon Hemans; Jack Henderson; Michael Hennelly; Michael Hennessy; Andrew Herda; Thomas Herman; Angel Hernandez; Carlos Hernandez; Daniel Hernandez; Ishmael Hernandez; John Hernandez; Manuel Hernandez; Marco Hernandez; Martin Hernandez; Richard

Hernandez; Vincent Hernandez; Matthew Hernbroth; James Herriman; Rixey Herron; Larry Herscher; James Hickey; Richard Hickey; Dennis Hickman; Lois Hicks; Michael Hilbert; Michael Hildreth; Frederick Hiles; Brent Hilgen; Gregory Hill; James Hill; Michael Hill; Randall Hill; Thomas Hill; Travis Hill; Michael Hinchley; Terrance Hinkel; Robert Hintz; Jeffrey Hinz; Leigh Hirschauer; Michael Hisel; Jerry Hlavaty; Martin Hoak; Marty Hobby; Scott Hockemeyer; David Hocking; Gloria Hodge; Jeffory Hodge; Alice Hodges; Douglas Hoellerich; Christopher Hoerler; Richard Hoey; Judy Hofbauer; Jack Hoffman; Russel Hoffman; John Hoglund; William Holloway; Marshall Holm; Richard Holmberg; Gary Holmen; Birl Holmes; Mark Holtfreter; Camille Holton; Richard Holub; James Holuj, Sr.; Gregory Homewood; Donald Hornessy; Burton Hooser; Christopher Hopp; Jesse Hopson; James Horan; Kevin Houlihan; Gary Houser; Ryan Housley; Jerry Howard; Owen Howard; Willie Howard; Susan Howarth; Daniel Hrpcha; David Huberty; Randy Hudson; Robert Huebner; Kevin Huff; David Huffhines; Dale Hughes; Marshall Hughes; Thomas Hughes; Nick Hulbert; Robert Huminsky; Jeremy Hummel; Willie Hunter; Joseph Huntzicker; Scott Hurlbut; Joseph Hurley; John Hurley, Jr.; Deborah Huska; Steven Huska; Paul Hussey; Daniel Huston; Christopher Hutson; Randy Hutting; Jeffrey Hysen; John Imberger; Scott Ingersoll; John Ippolito; Eliut Irizarry; Edgar Isaac; Matthew Isaacson; Roderick Isaacson; Joseph Isaia, Jr.; Henry Izzo, Jr.; John Jackson; Sidney Jackson; Steven Jackson; Nicholas Jacob; Larry Jacobs, Jr.; Eric Jaeger; Darryl Jahn; Michael Jahn; Todd Jahns; David James, Jr.; Pinkney James, Jr.; Thomas Jancik; Jeffrey Janecek; David Jankowski; Roland Janota; Daniel Janowiak; John

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Charles Kirian; Roderick Kirkwood; Merl Kiser, Jr.; Kevin Kladiva; Timothy Klapperich; Steven Klasinski; Jack Kleffman, Jr.; Richard Klein; William Klein; Edwin Klein, Jr.; Kenneth Kleindl; Joseph Klem; Joseph Klemencic; Lon Kline; James Kling; David Klingler; Linda Kloc; Michael Kloster; Kevin Kloubec; Keith Klusendorf; Debra Kluz; Shawn Knoll; Peter Kobit; J. Kochis; Sharon Koe; Karl Kohl; Kevin Kohrt; Jeffrey Kokal; David Kokaska; William Kokaska; Lawrence Kolcz; Joseph Kollander; James Kollbaum; Allan Koller; Robert Kolnick; Timothy Konczyk; David Kopach; Alan Kopp; Vicky Kopsell; Kenneth Kopterski; Robert Korem; Gordon Korth; Randy Kos; Joseph Kosar; Michael Koski; Steven;Kotches; Gregory Kotowski; James Kotrba; Donald Kotrba, Jr.; Jeffrey Koubek; Robert Kovas; John Kozak; Robert Kozar; Michael Koziol; James Kraft; Robert Krajecki; Alan Kramer; Paul Kranz; Jeffrey Krause; Robert Krause; Donald Kraz; Joyce Kreger; Mark Kreger; Dolores Kremnitzer; James Krichbaum; Jeffrey Kriebs; Richard Krikshiunas; Douglas Krippel; Michael Krizek; Timothy Kroening; Steven Kroll; Judith Kronkowski; Milan Krpan, Jr.; Quentin Kruck; Phillip Krug; Daniel Krzysciak; John Kubicek; Sharon Kuebker; Steven Kuhn; Thomas Kurucar; Frank Kuter; Alan Kutz; Joseph Kwak; James Kyles; Norman Labelle; Gregory Labuda; Marc Ladwig; Jay Lafontaine; Verne Lagerstrom; Jeffrey Lair; Robert Lamagdeleine; James Lamie; Benjamin Lamore; Carl Lancaster; Darran Landenberger; Karl Lang; Kenneth Lang; Kevin Langford; Thomas Langlois; Michael Larriuz; Kim Larsen; James Larson; Neil Larson; Ronald Larson; James Las; Gerald Laschober; John;Lasky; John Lau; Keith Laukert; Kevin Laurie; Jill Lauster; Terry Lavelle; Thomas Lavin; Rodney

Leach; Luanne Leahy; Mark Leahy; Douglas Leak; Jean Leamanczyk; Philip Ledford; Edward Ledvina; Brian Lee; Gary Lee; Patrick Leever; Eugene Lehn; Thomas Lehrke; Jeffrey Leifheit; Dale Lenart; Paul Lense; Louis Lenzi; Wayne Leonard; Guadalupe Leos; Vincent Leracz; Joshua Lerch; Larry Lerette; Betty Lesniewski; Linda Lessard; Paul Lessard; Donna Lester; William Lester; Robert Letto; Rodney Leverston; Kevin Levin; John Lewandowski; Jack Lewis; James Lewis; Stephen Lewis; Tony Lewis; Tina Lewis-Larsen; Jerry Libby; Gregory Lichamer; James Lickteig; Charles Liepitz; Christopher Lieser; Ronald Lietz; David Lindenmayer; Jayme Linder; Allan Lindsay; Stuart Lindsay; Gregory Link; Patrick Linsner; Wayne Liska; Ned Little; Marquita Little-Simpson; Todd Livesay; Derek Livingston; Richard Lizars; William Lock; Dean Loeffel; Michael Lojdl; Andre Lomax; Daniel Lombardi; Randal Long; Bruce Lopez; Kenneth Lopez; Michael Lopez; Rodolfo Lopez; Balbino Lopez Jr; Brian Lopresti Jr; Eladio Lorenzo; Michael Loser; Francis Loughran; Brian Love; Raymond Love; Wilbert Love; Russell Lovell; Richard Low; David Lubarski; Raymond Lucio; Calvin Luckett; Paul Luckey; Kenneth Ludke; Peter Ludwig; John Ludwisiak; Jeffery Lumbreras; Clark Lumsden; Ernest Luna; Brandon Lundberg; William Lundberg; Efrain Luque; Randy Lutzow; Edward Lynch; Michael Lynch; Thomas Machen; Vicente Macias; Darren Mack; Demetrius Mack; Joseph Mack; Michael Mack; James Mackinnon; Ella Madison-Strong; Larry Madlock; Frank Magnelli; Wayne Maier; Timothy Mainard; Edgardo Maldonado; Omar Maldonado; Ruben Maldonado; James Maloney; Mark Manella; James Mangum; Brenda Mann; Scott Mannaioni; Dennis Mannix; Kevin Manson; Michael Mantel; Paul Manzi;

Kenneth Marburger; Michael Marchio; Thomas Marcinkevic; Robert Margis; Erica Marici; Joseph Marino; Michael Marino; Gregory Markevicus; Michael Marks; Jeff Marmo; Felipe Marrero; Janice Marron; Dwain Marsh Jr; Arthur Marshall; Donn Martin; Duane Martin; Eric Martin; Gary Martin; Kevin Martin; Marquis Martin; Peter Martin; Robert Martin; Steven Martin; Thomas Martin; William Martin; Anthony Martinez; Claude Martinez; Dean Martinez; Ernest Martinez; Juan Martinez; Michael Martinez; Phillip Martinez; Richard Martinez; Roberto Martinez; Thomas Martinez; Daniel Martinkus; Aldo Martino; Terrence Martynowicz; Adam Marunde; Lawrence Masek; Daniel Massa; Martin Masterson; Philip Mathieu; Scott Matrisciano; Russell Matros; Troy Mattis; Michael Mattson; Paul Mattson; John Maubach; Ronald Maurizi; James Max; Michael Mayer; Paul Mayer; Debra Mayo; Matthew Mayo III; Clarence Mayweather, Jr.; Renee Mazariegos; Martin Mcaleer; James Mcardle; Douglas Mcarthur; Timothy Mcasey; Thomas Mcbride; Vikki Mcbride; Robert Mccall; Danny Mccallen; Lynell Mccallum; Kelly Mccann; Bernard Mccann Sr; Bradley Mccaw; Clarence Mcclelland, Jr.; Michael Mcclintock; Gary Mcclure; Michael Mcconville; Richard Mccormick; Andrew Mccoy; Steven Mccoy; Todd Mccrainey; Joseph Mccraren; Daniel Mcdonald; David Mcdonald; William Mcdonald; Gary Mcdougall; Thomas Mcdowell; Donald Mcelrath; Scott Mcelwee; Eugene Mcevoy; Melvin Mcfarland; John Mcgovern, Jr.; Clifford Mcgrail; Donald Mcgrain; Marcus Mcgraw; Robert Mckay; Don Mckendry; Frederick Mckinney; James Mckinney; Michael Mclaughlin; Thomas Mclaughlin; John Mcleod; Daniel Mcmahon; Michael Mcnally; Michael Mcneely; Ronald Mcneil; Michael Mcnulty; William

Mcvey; Bruce Mead; Michael Meathe; Henry Medina; Pablo Medina, Jr.; Aaron Meeke; James Megli; Linda Mehlman; Bryan Meier; Krista Meier; Carlos Mejia; Martin Mejia; Jose Melendez; Vasil Melnick; Mark Melone; Ernest Melton; Juan Mena; Michael Mendez; Arcides Mendoza; Donna Mendoza; Juan Mendoza; James Menietti; Franklin Mercer; Dale Merchant; Patrick Merkel; David Merritt; Craig Meseko; Brian Metzger; James Meyer; Matt Mezera Jr; Kenneth Michaels; Patrick Michaels; Thomas Michaelson; Ronald Michalek, Jr.; Thomas Michals; Dennis Michalski; Julie Michalski; Mark Micka; Cora Mickles; Michael Mihovilovich; Lawrence Mikolajczak; Chad Miller; Dennis Miller; Gary Miller; James Miller; James Miller; Jeffrey Miller; John Miller; Judith Miller; Kevin Miller; Robert Miller; Thomas Miller; Timothy Miller; Vincent Miller; Willie Miller, Jr.; James Mills; Jeffrey Mills; James Mims; Mark Minnihan; Emmett Minor, Jr.; Vincenzo Miritello; Aaron Mitchell; Alphaeus Mitchell; Charles Mitchell; Debrah Mitchell; Mary Mizera; Kurt Moeller; Mark Moeller; Alfred Molenhouse, Jr.; Louis Molina; Magdalene Molina; Michael Molitor; Roberto Molve; Dennis Monaco; Jay Money; Tommy Montalta; Julio Montanez; William Montavon; Christopher Montgomery; Clark Montgomery; Steven Montiel, Jr.; Anthony Moore; Clifford Moore; Dexter Moore; Donald Moore; George Moore; Lee Moore; Raymond Moore; Ronald Moore; Walter Moore; Gilberto Morales; Herman Morales; Charles Moran; Patrick Moran; Alberto Moreno; Arthur Moreno; Ivan Moreno; Victor Moreno; Michael Mores; Benjamin Morgan; Kendall Morgan; Larry Morgan; Dennis Morrin; Michael Morris; Neil Morris; William Morris; Craig Morrison; Kevin Morrison; Douglas Morrissey; Frederick Morse

Jr; Paul Mosier; Chet Moss; Robert Mott; Michael Moudry; Dennis Moyers; Michael Mudra; John Mueller; Raymond Mueller; Taalibdin Muhammad; Robert Muhich; Bernard Mullaney; Eileen Mullen; Jeffery Mullinax; Tonya Mund; Michael Mundelius; Rodney Mundle; Robert Munger; Isidro Munoz; John Murphy; Justin Murphy; Timothy Murphy; Valerie Murphy; David Murray; James Murray; John Murray; Michael Murray; Roger Murray; Alvin Murrell; Steven Muscolino; Kenneth Myers; Addie Myles; Jimmie Nabors; Tyrone Nalls; Patrick Nally; Richard Namen; Alan Nannini; Frank Naples; Michael Narducci; Linda Nash; Thomas Nason; Paul Neadly; Brenda Neal; Michael Neal; Robert Needham; Maurice Neeley; Randy Nehring; Richard Neiss; David Nelson; Thomas Nelson; Frank Nelson Jr; Curt Nesheim; Wesley Ness; Reid Nettleingham; Antonio Nevarez; Maurice Newkirk; Richard Newton; Danh Nguyen; Kent Nichol; Jerry Nichols; Robert Nichols; Ronald Nichols; William Nichols; Scott Nicholson; William Nightingale; Bronson Nimmer; Jerry Nissen; Bradley Noble; Wayne Noffke; Kevin Nolan; William Nolan; Robert Noonan; Kenneth Nordenberg; Ronald Norton; Janice Norvell; William Novak; Debora Novotny-Wydra; John Nowacki Jr; Eva Nowak; Michael Nowak; David Nuetzmann; Matthew Nugent; Lucio Nunez; Sharon Nuzzo; Kathleen Nystrom; Mark Oberg; Daniel O'Brien; William O'Brien; Michael O'Connell; Joseph O'Connor; Kevin O'Connor; Martin O'Connor; Thomas O'Connor; Walter O'Connor; Robert Odegaard; David O'Donnell; John O'Donnell; Thomas O'Donnell; Dwayne Oeffling; Lawrence Oertel; James Oester; Michael O'Halleran; Robert Ohlund Jr; Richard Ojeda; Paul O'Keefe; Sean O'Keefe; Robert Olczak; Perry Olin; Mary Oliva; Michael Oliver; Gary Olivo; Robert

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Wenzelman; Randy Werkheiser; Kenneth Weseman; Sh'Ree West; James Weydert; Jay Wheeler; Terrence Whelan; James White; Kevin White; Lanell White; Larry White; Scott White; Veronica White; William Whiteford; Ellery Whiteside; Mark Whitney; Jerome Wickey; Jerry Wideman; William Widlowski; Margie Wienke; Dale Wiersema; Steven Wiersema; Antonio Wiggins; David Wiggins; James Wiggins; Clarence Wignes; Raymond Wilda; Harold Wilkins; Jean Will; Celeste Williams; Ernie Williams; Glenda Williams; Glenn Williams; Lavander Williams; Leorn Williams; Robert Williams; Russell Williams; Wilma Williams; Robert Williamson; Kerry Willis; Brian Willms; Gary Wills; George Wilson; Jeffrey Wilson; Loren Wilson; Mark Wilson; Scott Wilson; John Wilson, Jr.; Ronald Wilwers; Jay Wimmer; Lynn Winiarski; Calvin Winter; David Wirth; Kent Wirth; Robert Wirth; James Wise; Mark Wise; Donald Wiser; John Woessner; Peter Wojnicki; Blaine Wolf; Reinhard Wolf; Richard Wolf; Brett Wolfe; Patrick Wood; Philip Wood; William Wood; Larry Woodle; Daniel Woods; David Wooten; Patrick Woulfe, Sr.; Michael Wragg; Dorian Wright; Patricia Wright; Edward Wrobel; Greg Wurglitz; David Yamaoka; Rocky Yamate; Stephen Yelk; Kenneth Yetka; John York; Kenneth Young; Roger Young; Allan Yursis; Michael Yusten; Frank Zaccari; Richard Zacharias; Carl Zajac; Kevin Zandrowicz; Mario Zapata; Gerald Zeman; James Zembruski; Francis Zepeda; John Zgonina; Raymond Zichmiller; Thomas Zickus; Richard Zimmerman; Robert Zink, Jr.; Thomas Zobel; Timothy Zobel; James Zuehlke; David Zuelke; Robert Zuidema, Jr.; Alexander Zydlewski.

Defendants-Appellees and Respondents:

EXELON CORPORATION, a Pennsylvania corporation, and COMMONWEALTH EDISON COMPANY, an Illinois corporation, individually and d/b/a EXELON GENERATION, EXELON GENERATION COMPANY, LLC, a Pennsylvania limited liability company, and EXELON BUSINESS SERVICES COMPANY, a Pennsylvania corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 522 F.3d 721. The Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois, which is reported at 05 C 4234, Dkt. No. 265; 2007 WL 2198380, 13 Wage & Hour Cas.2d (BNA) 832 (N.D. Ill., July 30, 2007).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

Introduction

As with the *Penn Plaza* litigation, this case presents an issue of exceptional importance to organized labor, management, and union members: whether an employer can force union members to arbitrate claims under the FLSA and analogous state statutes as a prerequisite for filing suit in a court. This Court has previously acknowledged that this question

of waiver of a federal forum is undecided under its precedents. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998). This Court granted *certiorari* in *Penn Plaza* to resolve whether a union can bind its members to arbitrate individual ADEA claims; this case allows the Court to complete consideration of the issues by addressing the same issues in the context of class and collective claims under the FLSA. *14 Penn Plaza LLC. v. Pyett*, 128 S.Ct. 1223 (Feb. 19, 2008); *reviewing Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007).

In *Jonites v. Exelon Corp., et al.*, the Seventh Circuit Court of Appeals affirmed the district court's order granting summary judgment against Plaintiffs' meal period claims under the FLSA based on application of *Leahy v. City of Chicago*, 96 F.3d 228 (7th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997), determining that a collective bargaining agreement adequately protected Plaintiffs' FLSA rights and that the grievance process was the more efficient means to determine whether the activities performed by Plaintiffs during their unpaid meal periods constituted compensable work. (App. 7a, 24a.) The district court also held that Plaintiffs' state law claims to recover for unpaid work during meal periods were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("LMRA"). (App. 35a – 37a.)

Other Circuits have reacted to the *Leahy* case as "preposterous."[1] The *Jonites* decision recognizes that

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[1] *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 264 (5th Cir. 1998). ("Not only is the majority position [in *Leahy*] 'preposterous,'

even if the bargaining unit employees' rights are arbitrated, the issues will not be resolved and the employees are entitled to a "second bite at the apple" for judicial review. (App. 12a.) Absolutely nothing in the FLSA supports a requirement for filing a grievance as a threshold requirement to establish standing for an FLSA claim. (*Compare* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*; *accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); Title I of the ADA, 42 U.S.C. § 12117; ADEA, 29 U.S.C. § 621 *et seq.*) While § 301 of the LMRA provides for arbitrators to interpret collective bargaining agreements, there is neither advantage nor legal authority authorizing arbitrators to interpret federal statutes. The *Jonites* court concedes that the collective bargaining process cannot waive individual federal rights. Yet, the Seventh Circuit decided to apply *Leahy* to *Jonites*, purportedly because of the heterogeneous nature of the class. The issue of class certification was not before the Court on appeal, and the matter was not remanded for resolution of the individual claims.

Statement of Facts

Plaintiffs are all organized labor members of International Brotherhood of Electrical Workers Local 15, the bargaining unit contracted with ComEd[2]

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it completely ignores the Supreme Court's decision in *Barrentine*.").

[2] Plaintiffs brought suit against Exelon Corp., Exelon Generation Company LLC, Exelon Business Services Co. and Commonwealth Edison Company. Although not decided by the district court, Defendants argued that ComEd was the only employer for the

pursuant to a collective bargaining agreement ("CBA"). The majority of employees in the Plaintiff class are linemen, or other similar positions, who are responsible for servicing electric transmission equipment above or below ground. (Vol. 22, Doc. 248, par. 7.)[3] These employees work at different locations as work is needed. (Vol. 17, Doc. 219, par. 63.) While working at a job site, they are not supervised by anyone from management, except via cell phones or through periodic site visits. (Vol. 17, Doc. 219, par. 63.) As such, Plaintiffs are instructed to maintain the safety and security of their job sites at all times, and to guard and protect their employer's equipment and materials. (Vol. 22, Doc. 248, par. 19.)

Plaintiffs are directed by their employer to continue to perform duties during their 30-minute unpaid meal periods to safeguard ComEd's equipment and materials, safeguard the site where work is being performed from public intrusion and from interference or theft, respond to any inquires from members of the public, and to protect the site from third-parties,

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members of the Plaintiff class. Plaintiffs agreed that Exelon Generation Company LLC was not liable in this case, however, Plaintiffs stated facts in opposition to summary judgment showing that Exelon Corp. and Exelon Business Services Co. are proper defendants in this case. (Vol. 20, Doc. 236, pars. 2-3) Because of the logic applied in the district court opinion, it did not address these arguments in its judgment. For ease of reference, Plaintiffs at times refer collectively to Defendants as "ComEd".

[3] Citations to pleadings, documents and orders will state the record volume, docket number, exhibit number, paragraph and/or page number, e.g. "Vol. 1, Doc. 236, par. 3."

including other contractors. (Vol. 20, Doc. 236, par. 19.) ComEd argued that employees could "secure" their jobsites while on the clock and were then free to use their meal break for their own benefit. However, Plaintiff Thomas Langlois testified that the Employees were instructed to "drop tools" rather than secure the jobsite. (Vol. 22, Doc. 240 – 55; Langlois Dep. p. 269 – 70.) ComEd's allegations about securing the jobsite overlook its own supervisors' contradictory testimony on what allegedly constitutes securing a jobsite. As one of ComEd's supervisors, Timothy Johnson, testified:

> [S]ecuring a job site is making a job site safe where nobody can walk by, nobody can fall in a hole, nobody could bump into something, nobody could be injured. It is kind of like if anybody from, any passerby, pedestrian, would include a blind person. To me that is securing a job site.
> Q. So for a job site to be secured it has to be a situation where a blind person could walk by as a pedestrian and not be injured?
> A. Yes. (Vol. 21 Doc. 240 – 51; Johnson Dep. p. 206 – 207.)

Ultimately, neither the district court nor the Seventh Circuit held that ComEd was entitled to summary judgment on the merits of the employees' claims for compensation during their meal periods.

Proceedings Below

Aside from being union members, many of the Plaintiffs are members of an opt-in class under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and a class was certified under Fed.R.Civ.P.

23 on claims asserted under the Illinois Wage Payment and Collection Act, 820 ILCS § 115/1, *et seq.*, and the Illinois Minimum Wage Law, 820 ILCS § 105/1, *et seq.* Plaintiffs seek remedies for ComEd's failure to pay, in accordance with these laws, all compensation due for certain work performed. For purposes of this petition, Plaintiffs seek reversal of the summary judgment against their federal and state law claims for compensation owed for work performed during unpaid meal periods.

The district court entered summary judgment "with evident reluctance" (App. 7a) against Plaintiffs' meal period claims under the FLSA based on application of *Leahy*, determining that the CBA adequately protected Plaintiffs' FLSA rights and that the grievance process was the more efficient means to determine whether the activities performed by Plaintiffs during their unpaid meal periods constituted compensable work. (App. 7a, 24a); *Leahy v. City of Chicago*, 96 F.3d 228 (7th Cir. 1996). The district court also held that Plaintiffs' state law claims to recover for unpaid work during meal periods were preempted by § 301 of the LMRA. (App. 35a – 37a.)

Finally, the district court granted summary judgment as a matter of law against Plaintiffs' claim that they were engaged to wait for call out at times as a result of Defendants' enforcement of the "ARCOS system." (App. 27a – 30a.) The ARCOS system is an automated call-out system used by ComEd to contact employees who are always on call. (App. 16a – 18a.) Plaintiffs had sought compensation for being engaged-to-wait in connection with ComEd's call out policies, however Plaintiffs have not sought review of the lower

courts' decisions dismissing those claims in this petition.

This suit was initially filed alleging that Plaintiffs were entitled to compensation under an "engaged-to-wait" claim in connection with ComEd's automated callout system. *See generally Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). However, during the course of class discovery, Plaintiffs amended their complaint to assert claims for unpaid compensation owed for work performed during their unpaid meal periods. (Dkt. No. 88.) Subsequently, the district court granted the motion for collective and class treatment without distinguishing between the meal period claims and the engaged-to-wait claims. (Dkt. No. 116.) After the close of discovery and while the motion for summary judgment was pending, Defendants filed a motion seeking, *inter alia*, to clarify the definition of the class with regard to the meal period claims. (Dkt. No. 255, 256.) However, before the Plaintiffs could address the motion to clarify the class definition, the district court struck the motion *sua sponte* (Dkt. No. 260) and subsequently decided the summary judgment motion. (App. 13a 39a.) The district court did not address the class description in its summary judgment decision, however the Seventh Circuit raised the issue on appeal. The class *sub judice* was defined with regard to the engaged-to-wait claims and, if given the opportunity, Plaintiffs will concede that the meal period claims require a separate class definition and amend the description of that class.

On appeal, the Seventh Circuit recognized that most courts, including that circuit, have held that

while an individual worker can expressly waive his right to a judicial remedy, a union cannot do so on his behalf. (App. 9a.) Under § 216(b) of the FLSA, Congress established a lower threshold for certifying collective wage actions compared to Rule 23. Yet the *Jonites* court held that *Leahy* and *Jonites* were "special cases" where the class claims must be arbitrated before the federal courts will enforce federal rights. (App. 10a.) This decision finds no support in other caselaw or in the particular facts of the two cases to indicate that claims for meal period compensation are "special cases." It is equally untenable to believe that there is a class action exception to this Court's holding in *Wright*.

This Court has already decided to resolve whether a union can agree to arbitrate individual federal rights and thereby waive the individual's right of access to a court. *Penn Plaza*, 128 S.Ct. 1223. Given the outcome in *Jonites*, this Court is called to resolve whether the outcome can be different for collective or class actions. In other words, if a union cannot waive a federal forum for individual rights, can the union nonetheless waive the right of access to a court to assert class rights? If the union cannot waive the individual rights, there is nothing special about this case that makes the outcome different for individuals represented in a collective action.

ARGUMENT

"Preposterous" Holding Cannot Be Reconciled with Other Circuits

The decision of the Seventh Circuit in *Jonites* cannot be reconciled with decisions reached on analogous issues in other federal circuits. Indeed, this Court has granted *certiorari* to answer the question, left open in *Wright*, of when a union "might" expressly waive an employee's individual federal rights. While the Second Circuit's decision in *Penn Plaza* reflects the consensus reasoning for mandatory arbitration of individual federal rights, the *Jonites* court reaches a completely different outcome in a collective action asserting federal rights and state rights certified for class treatment. *Cf. Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007).

Furthermore, *Jonites* presents a clear split with the Fifth Circuit, which has expressly refused to follow the Seventh Circuit's reasoning. *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259 (5th Cir. 1998). In *Bernard*, plaintiffs were maintenance workers at a beef processing and packaging plant who were members of a union and subject to a collective bargaining agreement. *Id.* at 262. They sought compensation for activities during their unpaid meal breaks, which they claimed were for the benefit of their employer. *Id.* The collective bargaining agreement in *Bernard* provided, "Should the Union or any individual employee desire to pursue a grievance pertaining to the violation of the Agreement, or violation of employee's working conditions, the matter shall be handled according [to the CBA's procedures]." *Id.* at 263. The employer

argued that the suit was filed under the CBA and, relying on *Leahy*, the collective bargaining agreement preempted plaintiffs' suit under the FLSA. *Id.* at 263 – 64. The Fifth Circuit agreed with the dissent in *Leahy* and held, "Not only is the majority position [in *Leahy*] 'preposterous', it completely ignores the Supreme Court's decision in *Barrentine*." *Id.* at 264. Applying *Barrentine*, the Fifth Circuit held that "plaintiffs' right to pursue a suit under the FLSA is completely independent from their rights under the CBA." *Id.* at 263 – 64.

The Second and Seventh Circuits agree that individual employees, subject to collective bargaining agreements, cannot be forced to grieve their individual federal rights. (App. 9a.) The *Jonites* court recognizes that an arbitrator's decision is not dispositive of the federal rights. (App. 11a – 12a.) Plaintiffs may receive a second bite at the apple, but only after satisfaction of a procedural obstacle that finds no basis in law and effectively abrogates Plaintiffs' rights to adjudication in a judicial forum. (App. 12a.)

Seventh Circuit recognized that *Wright* controlled the CBA *sub judice*.

The CBA in this case, as quoted in *Jonites*, simply provides that "should any dispute or difference arise between the Company and the Union or its members as to the interpretation or application of any of the provisions of this Agreement or with respect to job working conditions ..., the dispute or difference shall be settled through the grievance procedure." (App. 9a.) The Seventh Circuit recognized that this is not an "explicit" waiver of the right to sue under the Fair

Labor Standards Act (App. 9a); it is little different from the corresponding language in the collective bargaining agreement in *Wright*. *See Wright,* 525 U.S. at 72-73. Most courts, moreover, have closed the question that the Supreme Court left open in that case by holding that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf. (App. 9a); *Pyett v. Pennsylvania Building Co.,* 498 F.3d 88, 92 – 93 (2d Cir. 2007), *certiorari granted sub nom. 14 Penn Plaza LLC. v. Pyett*, 128 S.Ct. 1223 (Feb. 19, 2008); *Rogers v. New York University,* 220 F.3d 73, 75 – 76 (2d Cir. 2000) (*per curiam*); *Plumley v. Southern Container, Inc.,* 303 F.3d 364, 373 – 74 (1st Cir. 2002); *Air Line Pilots Association, Int'l v. Northwest Airlines, Inc.,* 199 F.3d 477, 481 – 85 (D.C. Cir. 1999); *Pryner v. Tractor Supply Co.,* 109 F.3d 354, 365 (7th Cir. 1997); *contra, Eastern Associated Coal Corp. v. Massey,* 373 F.3d 530, 533 – 34 (4th Cir. 2004). As the Seventh Circuit had previously reasoned, a union is not the freely chosen agent of every member of the bargaining unit (unless the vote for the union was unanimous); nor is consent to be represented in collective bargaining realistically the equivalent of consent to the union's waiving a worker's individual statutory rights. (App. 9a); *accord Pryner,* 109 F.3d at 362.

Leahy held that where a collective bargaining agreement provides "all time in excess of the hours worked in a normal workday (8 hours) and the normal workweek (40 hours) shall be compensated at the rate of time-and-one-half, the determination of whether a worker 'worked' during his lunch break was for the arbitrator to decide." (App. 7a); *citing Leahy,* 96 F.3d at 232. The dissenting judge in *Leahy* thought the

majority was ruling that collective bargaining agreements preempt the Fair Labor Standards Act, a view unacceptable in light of *Barrentine*. (App. 8a.); *Leahy*, 96 F.3d at 234 (Cudahy, J. dissenting); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Another Seventh Circuit panel, in an opinion subsequent to *Leahy*, said (without mention of that decision) that a "union cannot consent *for* the employee [to waive his right to a judicial forum] by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." *Pryner*, 109 F.3d at 363 (emphasis in original). "The machinery is 'union-controlled' because it can be activated only by the union's filing a grievance on behalf of an aggrieved employee; as long as the union acts in good faith it is not required to file a grievance even if the aggrieved employee asks it to do so." (App. 25a – 26a); *citing Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967); *Matthews v. Milwaukee Area Local Postal Workers Union, AFL-CIO*, 495 F.3d 438, 441 (7th Cir. 2007). In light of *Barrentine* and *Pryner*, the district court in this case ruled that *Leahy* must be confined to issues of working at mealtime, which is why he declined to apply the decision to the engaged-to-wait claim. (App. 25 – 26a.)

The year after the Seventh Circuit's decision in *Pryner*, this Court held in *Wright* that "a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination *might* be enforceable provided it was 'explicit.'" *Wright*, 525 U.S. at 80. The Seventh Circuit conceded that *Wright* applied to this case without discussing the pending decision in *Penn Plaza*, however it carved out

an exception to *Wright* for class and collective actions. (App. 9a, 10a.)

Arbitrator Not Best Judge to Interpret FLSA

The Seventh Circuit assumes without deciding that an arbitrator resolving a union grievance would be bound by federal law. (App. 11a.) The court's assumption contravened the language in the CBA specifically limiting the issues an arbitrator may address in a grievance to rights contained in the CBA. This assumption was based on the assertion that if the arbitrator ignored a well defined, explicit, and clearly applicable legal principle after it was brought to the arbitrator's attention, his disregard of it is "manifest" and can be set aside by subsequent litigation. (App. 11a.) Yet the court allowed that an arbitrator can interpret federal law, specifically interpreting the meaning of "work" under the FLSA, because the arbitrator "is likely to have a better understanding of the meaning of 'work' in the context of a specific bargaining relationship than a court would have." (App. 12); *citing Tice v. American Airlines, Inc.*, 288 F.3d 313, 317 – 18 (7th Cir. 2002).

No policy justifies requiring arbitration as a condition of access to a federal court to then apply federal law to adjudicate federal rights. Section 301 of the LMRA codifies a national policy of promoting uniform interpretations of collective bargaining agreements. However, in this case there is no justification for requiring an arbitrator to interpret and apply federal law.

> [The presumption of arbitrability], however, does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA. [citations omitted] .... The dispute in the present case, however, ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute. The cause of action Wright asserts arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement. [citations omitted] .... the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement.

Wright, 525 U.S. at 78 – 79 (emphasis in original); *contra Brown v. Illinois Central R.R. Co.*, 254 F. 3d 654 (7th Cir. 2001)(ADA claim preempted under RLA because interpretation of disputed terms in a CBA was dispositive of "essential function" determination).

Wright highlights the fallacies underlying ComEd's *Leahy* argument. Just as the cause of action Mr. Wright asserted arose not under the collective-bargaining agreement but under federal law in the form of the ADA, so the cause of action the Employees are asserting here arises not under the collective-bargaining agreement, but under federal law in the form of the FLSA. And just as the ultimate question for any arbitrator in Mr. Wright's case would have been not what the parties agreed but what federal law

(in the form of the ADA) required, so the ultimate question for any arbitrator in this case will be what federal law (in the form of the FLSA) requires. And just as in Mr. Wright's case, the fact that an arbitrator would be deciding the requirements of federal law led the Supreme Court to unanimously decide that arbitrability could not be presumed, so in the case at bar the same result is compelled: arbitrability cannot be presumed. Thus, ComEd's argument that this matter must be decided by an arbitrator is nothing other than the presumption forbidden under comparable circumstances in *Wright*.

The applicability of *Wright* to this case is crystallized in the analysis necessary to resolve Plaintiffs' FLSA claims. The Employees assert that ComEd's policies make their time spent during the uncompensated meal break "predominantly for the benefit of their employer." This case will require a review of ComEd's work conditions and company-wide policies and an inquiry of the activities required to meet those policies. To resolve these claims then requires applying federal law to the facts of this case. There is no need to interpret the CBA – and indeed nothing to interpret.

The proposition in *Leahy* that the collective-bargaining agreement takes precedence over the workers' individual, federal statutory rights under the FLSA *so long as the CBA comports with the* FLSA begs the questions of whether that agreement violates the FLSA, and who decides the question. Rhetorically, if the arbitrator later disagrees and decides the CBA does not protect rights assured under the FLSA, what then? After all, ComEd may assert that the CBA does

not violate the FLSA, but the Employees claim that it does; thus whether or not the collective-bargaining agreement violates the FLSA must be resolved by the courts in the first instance. There is no need for an arbitration when the employees inevitably must take a second bite at the apple in order to determine their federal statutory rights. (App. 12a.)

Furthermore, the Seventh Circuit overlooks the remedies available to employees under the FLSA, including liquidated damages, which would not be available in arbitration. *See Barrentine*, 450 U.S. at 744 – 45 ("[A]rbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs."); *accord Bernard,* 154 F.3d at 263 – 64. An arbitrator's authority is limited to the interpretation and application of the CBA. *Local 15, Intern. Broth. of Elec. Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779, 784 (7th Cir. 2007); *citing Amax Coal Co. v. United Mine Workers of Am., Int'l Union,* 92 F.3d 571, 575 (7th Cir. 1996). A legitimate award "draws its essence" from the CBA. *Local 15,* 495 F.3d at 784; *citing Amax*, 92 F.3d at 575.

Thus, this case involves a two-fold problem. First, there has been no analysis of whether the CBA does indeed protect the Employees' rights under the FLSA. Second, if this case is referred to an arbitrator, the arbitrator would be called to interpret federal law because there are no agreements of the parties in their contract to interpret and apply. Any resulting decision would thus exceed the scope of the arbitrator's authority. *See Barrentine,* 450 U.S. at 744 (An

"arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement. He 'is confined to interpretation and application of the collective bargaining agreement.'")

Avoid a Second Bite at the Apple by Eliminating the First One

The very crux of the problem with *Leahy* and *Jonites* is that requiring arbitration does not alleviate judicial review and there is policy to support requiring the additional step. *Jonites* recognizes and brushes aside this dilemma – the second bite at the apple – without resolving it. (App. 12a) There is simply neither reason nor legal justification for giving an arbitrator the first bite at the apple at the expense of the federal rights involved.

Leahy held that where a CBA protects an employee's rights, the employee is entitled to no more. (App. 7a), *citing Leahy*, 96 F.3d at 232. In this case, the district court never resolved if the CBA *sub judice* protects the Plaintiffs' FLSA rights. *Jonites* simply ignores the rationale in *Leahy* by assuming that the arbitrator will be bound to follow the FLSA, even though this Court has recognized that in a grievance an arbitrator may not award relief based upon federal rights. *See Barrentine,* 450 U.S. at 744 (An "arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement."). The arbitrator cannot adjudicate FLSA rights or award FLSA damages.

Here, the CBA is clear on its face that it does not protect the Employees' rights under the FLSA. The CBA simply provides, "During the regularly scheduled working day, there shall be a regularly scheduled meal period not to exceed one hour, except for employees whose work requires them to be on duty eight hours consecutively, in which case they shall eat at their work locations." (App. 7a; CBA Art IV, § 21.) That language requires no interpretation, and in no way resolves the claims asserted by the Employees. *Compare* (App. 7a); *Brown*, 254 F. 3d 654.

Leahy at least requires that, for the CBA to be a defense to a claim under the FLSA, it must protect the Employees' rights under the FLSA. *Leahy*, 96 F.3d at 232. Such an inquiry necessarily demands an analysis of the rights under the FLSA and possibly an inquiry into the protections afforded under the CBA. Particularly in this case, where the CBA is clear on its face that it does not protect the Employees' rights under the FLSA, the court must conduct such an inquiry.

The district court granted summary judgment concluding that an arbitrator should interpret the CBA. However, the CBA provides no basis to guide an arbitrator when a meal period would be, or would not be, compensable. Stated otherwise, the Employees' claims do not require an interpretation of the CBA because the CBA provides no definition of work begging interpretation. *Accord Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 – 10 (1988); *Brown*, 254 F. 3d 654 (7th Cir. 2001). If an arbitrator were to review a meal period claim, the only definitions of compensable work available would be those provided

under generally applicable federal law and Department of Labor regulations. Only a court may apply federal law and regulations, rather than a § 301 arbitrator. *See Barrentine*, 450 U.S. at 744.

Jonites recognizes, and cannot avoid, judicial review of the arbitrators' decisions, assuming all the class members' claims were individually grieved. (App. 11a); *accord Local 15*, 495 F.3d at 783. What the Seventh Circuit leaves unanswered is the value in subsequent judicial review of the arbitrator's analysis of federal law in a "special case." Under § 301 of the LMRA, judicial review of an arbitrator's interpretation of the CBA is "very limited." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'"). The court in *Jonites* states, "The arbitrator is likely to have a better understanding of the meaning of 'work' in the context of a specific bargaining relationship than a court would have, and so if the statutory and contractual standards are identical, the arbitrator's decision is entitled to consideration in a follow-on FLSA case." (App. 12a.) However, an understanding of the meaning of work is simply an interpretation of federal law developed under the FLSA. Since no language of the CBA may bear on the meaning of work in that, or any other context, an arbitrator's determination is nothing more than a gratuitous view of federal law, irrelevant in the context of later court proceedings. (App. 12a.)

Under these circumstances, there can be no justification for giving deference to an arbitrator's interpretation of federal law; § 301 simply does not apply. A district court's legal reasoning is given no deference under a *de novo* appellate review, and the arbitrator's interpretation of federal law would be reviewed *de novo*. In this case, the Seventh Circuit affirmed a judgment against the Plaintiff class because the class had not previously pursued a grievance under the CBA. However, if the Plaintiff class had previously pursued a grievance, the outcome of that grievance would have no bearing on this subsequent litigation.

There is no justification for imposing the grievance as a preliminary step. There is no need to interpret the CBA. *Compare Lingle*, 486 U.S. at 409 – 10; *Brown*, 254 F. 3d at 668. The arbitrator is both unable and ill-equipped to interpret and apply the FLSA. *Barrentine*, 450 U.S. at 744. The Seventh Circuit recognizes that its holding in *Jonites* creates a problem by mandating a second bite at the apple in order to adjudicate the Employees' federal rights. (App. 12a.) Under its reasoning, the second bite at the apple, namely the judicial review, cannot be avoided. However, the first bite, the arbitration, is an unnecessary obstacle and must be eliminated.

CBA Cannot Abrogate Plaintiffs' FLSA Rights

The Seventh Circuit holds that in "close" FLSA cases "it makes sense to let private arrangements endure – for the less flexible statutory approach has the potential to make everyone worse off." (App. 12a); *citing Dinges v. Sacred Heart St. Mary's Hospitals, Inc.*, 164 F.3d 1056, 1059 (7th Cir. 1999). The Seventh

Circuit held that if an arbitrator finds that Defendant "does not require its linemen to work during lunch, that finding should be entitled to considerable weight in an FLSA case." (App. 12a.) That reasoning abrogates the federal courts' responsibility to interpret federal laws. U.S. Const., Article III.

Furthermore, this Court has specifically rejected the argument that collective bargaining agreements may abrogate employees' FLSA rights. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), mining companies had relied on "immemorial custom and *agreements arrived at by the practice of collective bargaining*" to argue that the time that the miners spent walking underground was not compensable "work" under the Fair Labor Standards Act. *Id.* at 600-601 (emphasis added). Faced with the argument that the collective-bargaining agreement had defined away the status of underground walking as "work" – which argument is structurally identical to the one ComEd is making in the case at bar – the Supreme Court came out squarely and decisively against the positions of the mining companies:

> *[I]t is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work.* The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all

> work or employment engaged in by employees covered by the Act. *Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights. Id.* at 602-603 (emphasis added, footnote omitted).

Barrentine quoted this very passage from *Tennessee Coal* in holding once again that a collective-bargaining agreement cannot vitiate workers' individual rights under the FLSA. *Barrentine*, 450 U.S. at 740 – 41, *quoting Tennessee Coal*, 321 U.S. at 602 – 603.

Section 301 of the LMRA may provide that an arbitrator is best positioned to determine the meaning of a collective bargaining agreement. However, the *Leahy* and *Jonites* line of reasoning does not implicate § 301 because this case does not involve interpretation of the CBA. *Lingle*, 486 U.S. at 409 – 10. The FLSA does not allow for employees to waive the threshold employment rights to overtime and minimum wage without nullifying the Act's purposes and setting aside the legislative goals it wanted effectuated. *Barrentine*, 450 U.S. at 740. The CBA cannot set a threshold for compensation lower than the minimum requirement in the FLSA. If the meal periods are compensable under the FLSA, then any conflicting interpretation of the CBA is irrelevant.

The question is whether the Plaintiffs' meal periods constitute work. If the answer is "yes," then the CBA cannot remove the obligation to pay the employees; and the arbitrator cannot answer the question. Thus,

the Employees should not be required to first seek an answer from an arbitrator.

No Class Exception to *Wright* or *Penn Plaza*

Nothing justifies the Seventh Circuit's policy decision to create a class action exception to this Court's holding in *Wright*. The union has no more authority to waive its members' class rights than it does to abrogate individual federal rights. The Seventh Circuit referred to this as a "special case" in which the dismissal of the FLSA suit can be reconciled with *Wright,* because, "[a]s in *Leahy,* the plaintiff class here is hopelessly heterogeneous." (App. 10a.) However, limiting *Jonites* to a holding that applies only to heterogeneous classes is an untenable result. The *Jonites* court attempted to create an exception to *Wright* for class cases. No such exception is justified.

This Court has approved district court involvement in facilitating notice of a collective action, holding that a district court may supervise and authorize the mailing of notice to potential plaintiffs, informing them of their right to opt into the case. *Hoffman-LaRoche. Inc. v. Sperling*, 493 U.S. 165 (1989). The FLSA "authorizes a representative action; and this authorization surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit....". *Woods v. New York Life Ins. Co.,* 686 F.2d 578, 580 (7th Cir. 1982). Because of the opt-in nature of the FLSA collective action under § 216(b), the threshold for facilitating notice to the potential claimants, that they be "similarly situated," is lower than for certifying a class under Rule 23. *Hipp v. Liberty Nat. Life Ins. Co.*,

252 F.3d 1208, 1218 (11th Cir. 2001)(similarly situated determination is a "fairly lenient standard"); *citing Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995). The low threshold for collective treatment in § 216(b) is further evidence that the policy underlying the FLSA encouraging collective treatment cannot be abrogated by § 301 or the CBA.

Plaintiffs have pursued claims based on an employer's generally applicable policies and procedures mandating certain continuing duties during unpaid meal periods. Since the policies requiring Plaintiffs to guard and secure their job sites during their unpaid meal periods are uniform, the lower courts were wrong to conclude that the "efficiency" reasoning of *Leahy* should apply to this case. Unlike *Leahy*, this case addresses the legal effect of a consistent policy rather than sporadic interruptions to the rights of only certain individuals to an uninterrupted meal period. The collective-bargaining agreement provides no guidance on whether the activities conforming to Defendants' policies constitute work, and a grievance would therefore be wholly ineffective to resolve the question of what is work – instead the arbitrator would be deciding not what was in the collective-bargaining agreement, but "the ultimate question [of] what federal law requires." *See Wright*, 525 U.S. at 82.

Admittedly, certain individuals included in the class definition do not have any claim for compensation during unpaid meal periods, either because they work in ComEd's offices instead of at a jobsite or because they do not have unpaid meal breaks. This suit was initially filed alleging that

Plaintiffs were entitled to compensation under an "engaged-to-wait" claim in connection with ComEd's automated callout system, and the meal period claim was added by later amendment. The discrepancy is easily corrected – those employees who do not work at a jobsite can be identified by their job title and ComEd bears the burden to maintain records of when its employees were on unpaid meal periods. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Other than these exceptions, the class has adequate commonality. Every member of the class who works at a jobsite and receives an unpaid meal break is subject to a uniform policy requiring them to maintain the security of their jobsite. What the Seventh Circuit calls heterogeneity – without any record on appeal from which to make any determination – can be easily corrected by redefining the class appropriate to the meal period claims rather than engaged-to-wait claims originally asserted in this case.

The Seventh Circuit disparagingly acknowledged that named Plaintiffs and the other members of the class have an FLSA claim that they could press in an individual suit. (App. 10a.) Despite that court's efforts to assail the definition of the class, the Seventh Circuit neither decided the issue of whether the class was properly certified nor remanded the case to resolve the individual claims. The court instead stated, "the filing of this class action suggests that [the named Plaintiffs] have no stomach for proceeding case by case." (App. 10a.) That reasoning is result-oriented. If the class is heterogeneous, it should be decertified and the case remanded to resolve the individual claims, or to redefine the class, if possible. The Plaintiffs were more

than willing to proceed on an individualized basis, but they were never given the chance because the Court did not remand the matter. This appeal was not decided based upon an erroneous class definition; the Seventh Circuit held that although a collective bargaining agreement may not force arbitration of an individual federal right, it can require arbitration of a federal right asserted on behalf of a class.

Union Member's Bill of Rights

An explicit statute on point was overlooked in *Jonites*: the Bill of Rights for Union Members. This statute states, in relevant part:

> **(4) Protection of right to sue.** No labor organization shall limit the right of any member thereof to institute an action in any court or a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding ....

Labor-Management Reporting and Disclosure Act of 1959 §101(a)(4) *codified at* 29 U.S.C. §411(a)(4). This subsection of the Union Member's Bill of Rights applies to actions that the union member may have against the employer. *See Moore v. Local 569 of Intern. Broth. of Elec. Workers*, 53 F.3d 1054, 1057 (9th Cir. 1995), *cert. denied sub nom*; *Fischbach & Moore, Inc. v. Moore*, 516 U.S. 1111 (1996); *accord*, *Batorsky v. Sheedy*, 13 F.Supp.2d 287, 292 (N.D.N.Y., 1998). Thus, the prohibition in the Union Member's Bill of Rights preventing a union from agreeing to collective

bargaining provisions that "limit the right of any member thereof to institute an action in any court" supports the holding and logic of *Wright* and further shows that *Jonites* should be reversed.

Section 301 Cannot Preempt the FLSA

The Seventh Circuit stated that this appeal requires an analysis of the relationship between section 301(a) of the Labor Management Relations Act, which authorizes federal suits to enforce collective bargaining agreements, and the Fair Labor Standards Act, the federal minimum-wage and maximum-hour law. (App 1a – 2a.) This argument confuses the categorical difference between preemption of a state law claim, which is controlled by the Supremacy Clause in Article VI, § 2 of the Constitution, and "preemption" of a federal claim, which is really a matter of statutory construction and harmonization.

It is black-letter law that "not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is pre-empted by Section 301 or other provisions of the federal labor law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). This Court has stressed that where plaintiffs only need to refer to CBA provisions "that might be helpful in determining the damages to which a worker prevailing in a state lawsuit is entitled," their claims will not result in preemption. *Lingle,* 486 U.S. at 413, n.12; *see also Baker v. Kingsley*, 387 F.3d 649, 658 (7th Cir. 2004) (noting that the Supreme Court has cautioned against finding preemption where reference to the collective

bargaining agreement is needed only for computation of damages).

In responding to the appeal, ComEd relied upon *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Brown,* 254 F. 3d 654, in support of their argument that the Employees' FLSA rights are preempted. Neither ComEd nor the Seventh Circuit cited any case holding that § 301 "preempts" FLSA rights to compensation which, of course, was an issue discussed extensively in *Barrentine*. Indeed, the strong policy in the FLSA against waiver renders the argument unavailing. *See Barrentine,* 450 U.S. at 740 ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.").

In *Hawaiian Airlines*, the Supreme Court addressed preemption of a state law claim under the Railway Labor Act ("RLA"). "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301... In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Hawaiian Airlines*, 512 U.S. at 260 – 61; *citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 – 12 (1985). Notwithstanding policies encouraging arbitration, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual

workers. *Hawaiian Airlines*, 512 U.S. at 259; *citing Atchison, T. & S.F.R. Co. v. Buell*, 485 U.S. 557, 565 (1987).

In citing *Buell*, the Supreme Court in *Hawaiian Airlines* considered preemption issues with regard to federal claims. "It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the [Federal Employers' Liability Act] simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Hawiian Airlines*, 512 U.S. at 259; *citing Buell*, 485 U.S. at 564 – 65; 45 U.S.C. § 51 *et seq*. Given the clear language in *Hawaiian Airlines* acknowledging the limits to preemption under § 301 and the RLA, Defendants' reliance on the case to argue preemption of FLSA rights is misplaced.

While the specific holding in *Hawaiian Airlines* dealt with state law claims, preemption of an FLSA claim requires construction of arguably competing federal laws. The choice between two federal statutes requires an analysis of both, to see if they are indeed incompatible or if they can be harmonized, and if they are incompatible, to decide which one Congress meant to take precedence. *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 583 – 84 (7th Cir. 1999). Since Congress intended that FLSA rights to a minimum wage and overtime should take priority over an employee's right to contract, even collectively, certainly those rights take priority to § 301 and the public policy supporting arbitration to provide consistent interpretations of collective bargaining agreements. Such an outcome is

as inconceivable as the scenarios contemplated in *Buell* and *Hawaiian Airlines*.

Similarly, the Federal Arbitration Act has no more preemptive impact over the FLSA rights than does § 301 of the NLRA. At issue in this petition is a question of when employees can be compelled by a collective bargaining agreement to arbitrate their federal rights. The FAA is merely a generally applicable statute addressing arbitration clauses. Section 301 is far more specific to this case than the FAA. If § 301 is not interpreted to "preempt" the FLSA rights, the FAA cannot possibly provide a different outcome.

The Plaintiff class is entitled to compensation for their meal periods

In a factually similar case involving utility employees who routinely worked on lines strung between poles, in trenches and in manholes, the Second Circuit addressed a similar claim for unpaid meal period wages:

> During their lunch break, the workers are restricted to the site for the purpose of performing valuable security services for the company. The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers' lunch break. To be sure, the workers perform different services during meal breaks than throughout the rest of the day, but the workers' onsite presence is solely for the benefit of the employer and, in their

> absence, the company would have to pay others to perform those same services. By not compensating these workers, SNET is effectively receiving free labor.

Reich v. Southern New England Telecommunications Corp., 121 F.3d 58, 65 (2d Cir. 1997) (hereinafter "*SNET*"). The Second Circuit might have been describing the facts of this case.

The record in this case contains ample evidence supporting Plaintiffs' allegations that compensable "work" functions and activities are mandated during the 30-minute unpaid meal breaks. As in *SNET*, Plaintiffs are responsible to continue during their 30-minute unpaid meal periods their duties to safeguard Defendants' equipment, safeguard the site where work is being performed from public intrusion and from interference or theft, to respond to any inquiries from members of the public, and to protect the site from third-parties including other contractors. (Vol. 20, Doc. 236, par. 19.) Plaintiffs are not allowed to sleep during this 30-minute unpaid period, evidencing a need to be alert for purposes of keeping the job site safe and secure. (Vol. 20, Doc. 236, par. 19.) Failure to properly guard, protect and ensure the security of the job cite during the meal period can subject the employees to discipline. (Vol. 20, Doc. 236, par. 19.)

Further, just as in *SNET*, Plaintiffs' meal breaks are required to be taken at a specific time; with rare exception, between 11:30 and 12:00. (Vol. 20, Doc. 236, par. 18.) Plaintiffs' job has always been considered a "lunch box" job, meaning eating food brought by the worker to the job site was understood to be for all

practical purposes, required. (Vol. 17, Doc. 219, pars. 67-68.) If the workers' activities on a particular project or task are not yet completed at the meal break time, workers are prohibited from "breaking down" the job site, meaning major work equipment and processes remain in place, ready for work to resume after the meal break is over. (Vol. 22, Doc. 240 – 55.) Rather than breakdown or secure a job site, Plaintiffs are instructed to "drop tools" and begin their lunches without significant efforts to secure the jobsite. (Vol. 22, Doc. 240 – 55.)

Of course, it is elementary that Plaintiffs need "prove" nothing at this summary judgment stage. In fact, this FLSA claim poses a rare "burden shifting" which complicates the employer's defenses. Indeed, Defendants' failure to maintain compliant meal break time records creates presumptions on Plaintiffs' behalf and shifts to Defendants the burden of proof on the subject of how much time was spent working during unpaid meal periods. *See Anderson,* 328 U.S. at 687 – 88. The sorting out of what specific restrictions and obligations accompany a worker's meal time and the impact of those restrictions and obligations should have been reserved for a properly instructed jury.

CONCLUSION

For all of these reasons, Plaintiffs respectfully submit that the petition for writ of certiorari should be granted in order to assure the decision in this case conforms to applicable precedent, including as may be clarified in this Court's decision in *Penn Plaza*.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
Seventh Circuit

No. 07-3053

[Filed April 3, 2008]

Peter P. JONITES, *et al.*, individually and on behalf of others similarly situated,	)
Plaintiffs-Appellants,	)
v.	)
EXELON CORPORATION, *et al.*,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 4234 — David H. Coar, *Judge*.

Before POSNER, ROVNER, and EVANS, *Circuit Judges*.

POSNER, *Circuit Judge*. This appeal requires us to analyze the relation between section 301(a) of the Labor Management Relations Act (Taft-Hartley), 29 U.S.C. § 185, which authorizes federal suits to enforce

collective bargaining agreements, and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, the federal minimum-wage and maximum-hour law. The plaintiffs represent a class (an "opt-in" class under 29 U.S.C. § 216(b); see *Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099, 1101 (7th Cir. 2004)) of more than a thousand linemen and other hourly workers employed by Commonwealth Edison. (Affiliates of Com Ed are also defendants, but need not be discussed.) The plaintiffs claim that Com Ed has violated their rights under the FLSA by the way it implements its "call out" program and also by forcing them to work during their lunch break without paying them anything, let alone the overtime pay to which they are entitled if they are indeed working then, because the time allotted to those breaks, if added to the normal work week, exceeds 40 hours.

The district judge granted summary judgment for Com Ed. He ruled that the implementation of the call-out program does not violate the FLSA and that the plaintiffs' only remedy for the alleged mealtime violation is a proceeding to enforce their rights under the grievance and arbitration provisions of the collective bargaining agreement between the electrical workers union and Com Ed. The union did seek arbitration, but only with regard to the call-out program. It lost, and we rejected the union's challenge to the arbitrator's decision. *Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779 (7th Cir. 2007).

Com Ed's "automated roster call out system"—"ARCOS"—notifies off-duty employees by a phone call to their home phone, beeper, or cellphone

when additional manpower is needed on an emergency basis. An employee is not required to accept a call out, but if he fails to answer more than 50 percent of the calls or refuses to accept more than 35 percent of the call outs (other than because of excused absences, as when the worker is ill or on a scheduled vacation), he is disciplined. And if he continues to fall below either minimum he may be fired, in which event he is forbidden to work on Com Ed property or projects even as the employee of an independent contractor.

An employee who accepts the call out travels first to his normal duty station and then to the work site. He is paid not only for the time working but also for the time it takes him to get to the site from his normal duty station and return there when he has finished working. But he is not paid for the time he spends commuting to and from his normal duty station.

Most call outs occur on weekends, but the frequency varies considerably among workers. A few are called as often as once every five-and-a-half days on average, and some others no more than once a month.

Com Ed has always had to call out workers for emergency repairs, and the fact that its call-out procedure is now automated is not what bothers the workers. What bothers them is that a cost-motivated reduction in the number of Com Ed's employees has led the company to insist on a much higher response rate than in the old days, when no response rate was specified and the average rate was below 20 percent and sometimes below 10 percent. The plaintiffs argue that the frequent call outs disrupt their home life and

that therefore while waiting for a call they are working, within the meaning of the Fair Labor Standards Act, and thus are entitled to be paid the minimum wage for their waiting time. They do not press their claim to its logical conclusion—that they are entitled to be paid for working 168 hours a week (since an electrical outage or other emergency can occur at any time), with 128 of them constituting overtime—but instead argue vaguely that they should be paid for "some of the time" during which they are subject to call, with how much to be left to the trier of fact to determine. The determination would have to be made on a case-by-case basis since the call-out experience varies so among the workers.

In its suit to set aside the arbitrator's decision refusing to invalidate ARCOS, the union had argued unsuccessfully that the adoption of the program was outside the scope of the management-rights clause in the collective bargaining agreement. It had also argued that the program violated the Fair Labor Standards Act, but we held that that argument had been forfeited.

The arbitrator, so far as appears, did not decide whether the collective bargaining agreement places any limitations on ARCOS. The language of the agreement suggests that it does not; it states that "an employee ordered to remain at a specified location, awaiting a call for emergency work outside scheduled working hours, shall be paid the applicable [wage] rate until release." He is not required to remain at home, but only to leave word where he can be reached, which is easily done if he has a cellphone or a beeper, for then he has only to give Com Ed his number and be

sure to have the instrument with him and turned on when he's not at home. But it is implicit in the agreement, as we shall see when we come to the mealtime question, that an employee is entitled to be paid whenever he *is* working; and the plaintiffs argue that even if they are not tied to their home when they are off duty, still their freedom is so far curtailed that they are "engaged [i.e., hired] to wait," and so are entitled to be paid.

The plaintiffs base their claim to off-duty pay on the Fair Labor Standards Act. Although all of them are represented in collective bargaining by the union that lost its suit to invalidate the arbitrator's decision, Com Ed does not contend that the claim is barred by res judicata despite the outcome of the union's suit, and it is right not to contend that. E.g., *McDonald v. City of West Branch,* 466 U.S. 284, 291 (1984). Although the union represents all the workers in the bargaining unit, it is not their agent in the usual sense, since once a majority of the workers agree to be represented the minority is bound as well. 29 U.S.C. § 159(a). Nor does voting for a union evince consent to the union's bargaining away the workers' statutory rights. So we must decide whether the district court was right to find that the rules implementing ARCOS do not violate the Fair Labor Standards Act.

A regulation of the Labor Department the validity of which is not challenged provides that "an employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.'" 29 C.F.R. § 785.17; see *Pabst v. Oklahoma Gas & Electric Co.,* 228 F.3d 1128, 1130-31 (10th Cir.

2000); cf. 29 C.F.R. § 553.221(c), (d). This may be true for some members of the plaintiffs' class, but obviously not for all or even most. The call-out procedure does not require that the worker stay at home or at any other designated location, but only that he be reachable by the company, and the regulation we just quoted goes on to provide that "an employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." See *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944).

Of course the requirement that one accept 35 percent of one's call outs curtails a worker's freedom of action somewhat even if they are infrequent, because if he is only slightly above the floor he will be jeopardizing his job if he leaves town for the weekend. But that does not mean that he must stay in the house all weekend. He just must stay within a two-hour radius of his normal duty station (for that is the time he is allowed for getting there if he accepts the call out). Is that such a hardship that it turns his waiting into working? We think not, in agreement with the case law on the issue, *Dinges v. Sacred Heart St. Mary's Hospitals, Inc.*, 164 F.3d 1056, 1058 (7th Cir. 1999); *Adair v. Charter County of Wayne*, 452 F.3d 482, 486-89 (6th Cir. 2006); *Ingram v. County of Bucks*, 144 F.3d 265, 268-70 (3d Cir. 1998); *Andrews v. Town of Skiatook*, 123 F.3d 1327, 1332 (10th Cir. 1997); compare *Cross v. Arkansas Forestry Commission*, 938 F.2d 912, 916-17 (8th Cir. 1991), though no case is exactly like this one.

Some 70 to 90 percent of the class members work the daytime shift and they claim that the half hour that the company allows them for lunch at the job site is really work time. They are forbidden to sleep during the lunch period and required (that's why they mustn't sleep) to be alert to trespassing at the site and theft of or damage to tools. They are not required to patrol the site, but merely, while sitting in the cab of their truck eating lunch, to keep a sharp eye out for trespassers. Being forbidden to sleep during a short lunch break cannot be too great a hardship, as it is hard to sleep and eat at the same time. The district judge, however, did not determine whether any of the class members are required to work during the lunch break, but instead, though with evident reluctance, ruled that the question was within the exclusive competence of an arbitrator to decide. He felt compelled to this result by our decision in *Leahy v. City of Chicago,* 96 F.3d 228 (7th Cir. 1996), which held that where a collective bargaining agreement provides that "all time in excess of the hours worked in a normal workday (8 hours) and the normal workweek (40 hours) shall be compensated at the rate of time-and-one-half," *id.* at 232, the determination of whether a worker "worked" during his lunch break was for the arbitrator to decide. The agreement in this case provides that "the basic workday shall normally consist of eight hours of work which shall be consecutive except when time out for a meal is scheduled." The question whether mealtime is really "time out" from "work" is a question of both contractual and statutory interpretation, and the court in *Leahy* ruled that it was for the arbitrator to determine whether the workers there were being made to work during their mealtime. "The FLSA requires no more." *Id.*

The dissenting judge in *Leahy* thought the majority was ruling that collective bargaining agreements preempt the Fair Labor Standards Act, a view unacceptable in light of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). Another panel of this court, in an opinion subsequent to *Leahy*, said (without mention of that decision) that a "union cannot consent *for* the employee [to waive his right to a judicial forum] by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) (emphasis in original). (The machinery is "union-controlled" because it can be activated only by the union's filing a grievance on behalf of an aggrieved employee; as long as the union acts in good faith it is not required to file a grievance even if the aggrieved employee asks it to do so. *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967); *Matthews v. Milwaukee Area Local Postal Workers Union, AFL-CIO*, 495 F.3d 438, 441 (7th Cir. 2007).) In light of *Barrentine* and *Pryner*, the district judge in this case ruled that *Leahy* must be confined to issues of working at mealtime, which is why he declined to apply the decision to the call-out claim.

The year after our decision in *Pryner*, the Supreme Court held in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998), that "a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" *might* be enforceable (not that it would be—the Court left the question open) provided it was "explicit." *Wright* was a discrimination case, but we can assume that its

holding applies to other statutory rights, *O'Brien v. Town of Agawam*, 350 F.3d 279, 284-86 (1st Cir. 2003), and thus to *Leahy* and the present case.

The collective bargaining agreement provides that "should any dispute or difference arise between the Company and the Union or its members as to the interpretation or application of any of the provisions of this Agreement or with respect to job working conditions ..., the dispute or difference shall be settled through the grievance procedure." This is not an "explicit" waiver of the right to sue under the Fair Labor Standards Act; it is little different from the corresponding language in the collective bargaining agreement in *Wright*. See 525 U.S. at 72-73. Most courts, moreover, have closed the question that the Supreme Court left open in that case (the "might" question) by holding, as we had done in *Pryner*, that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf. *Pyett v. Pennsylvania Building Co.*, 498 F.3d 88, 92-93 (2d Cir. 2007), certiorari granted under the name of *Penn Plaza LLC v. Pyett*, No. 07-581 (U.S. Feb. 19, 2008); *Rogers v. New York University*, 220 F.3d 73, 75-76 (2d Cir. 2000) (per curiam); *Plumley v. Southern Container, Inc.*, 303 F.3d 364, 373-74 (1st Cir. 2002); *Air Line Pilots Association, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-85 (D.C. Cir. 1999); contra, *Eastern Associated Coal Corp. v. Massey*, 373 F.3d 530, 533-34 (4th Cir. 2004). As we noted earlier, a union is not the freely chosen agent of every member of the bargaining unit (unless the vote for the union was unanimous); nor is consent to be represented in collective bargaining realistically the equivalent of

consent to the union's waiving a worker's individual statutory rights.

Leahy, though, was a special case, as is this case, and in both cases the dismissal of the FLSA suit can be reconciled with *Wright, Pryner*, and the other cases that we have cited. The plaintiffs in *Leahy* wanted us to rule that "since some [police] officers on some days miss all or part of their meal periods" because they are required to work then, "all meal periods [are] compensable work." 96 F.3d at 232. The plaintiffs in this case want us to rule that because some Com Ed employees may sometimes do some work at lunch, all Com Ed employees are entitled to pay during their lunch break (overtime pay at that, because the half-hour lunch break is on top of an eight-hour workday). It is that argument, rather than the rejection of the same argument in *Leahy,* that is preposterous. As in *Leahy,* the plaintiff class here is hopelessly heterogeneous. We noted this in discussing the call-out claim; in regard to the mealtime claim, the abuse of the class-action device (or "collective action," as class suits under 29 U.S.C. § 216(b) are more commonly referred to) is even more egregious; the class includes workers who have no conceivable mealtime claim because they do not work the day shift. The plaintiffs and the other members of the class, or some of them, may have an FLSA claim that they could press in an individual suit, but the filing of this class action suggests that they have no stomach for proceeding case by case. If they are unwilling to file individual suits, or create homogeneous classes in order to bring proper class actions, then, since an essential condition of maintaining an FLSA class action—that the members of the class be "similarly

situated" to one another, 29 U.S.C. § 216(b)—is not satisfied, their only recourse is to ask the union to file grievance proceedings under the collective bargaining agreement. We assume that this route remains open, since the mealtime issue was not raised in the previous arbitration.

The union will be able to insist in any such arbitration that the arbitrator comply with the Fair Labor Standards Act. If he rules that a particular Com Ed worker is required to work during mealtimes, but that it is such easy work that it is undeserving of the minimum wage, let alone of overtime, his decision will be set aside for "manifest disregard" of the law. *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268-69 (7th Cir. 2006). "[W]here a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature," his disregard of it is "manifest." *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002). For "an arbitrator may not direct the parties to violate the law." *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

Furthermore, the collective bargaining agreement in this case, unlike the ones in *Pryner* and *Wright*, sets forth a standard for the arbitrator to apply that is materially identical to the statutory standard: if an employer requires an employee to work during meal time, then that time is not "time out" from "work." Neither the statute nor the collective bargaining agreement defines "work," but the Supreme Court has defined it as "physical or mental exertion (whether

burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123,* 321 U.S. 590, 598 (1944); see *Bernard v. IBP, Inc. of Nebraska,* 154 F.3d 259, 264-65 (5th Cir. 1998); *Reich v. Southern New England Telecommunications Corp.,* 121 F.3d 58, 63-65 (2d Cir. 1997). We are given no reason to suppose that an arbitrator interpreting "work" in the collective bargaining agreement would understand the word to mean something different. If he finds that Com Ed does not require its linemen to work during lunch, that finding should be entitled to considerable weight in an FLSA case, should a proper one be brought. "Although the FLSA overrides contracts, in close cases it makes sense to let private arrangements endure—for the less flexible statutory approach has the potential to make everyone worse off." *Dinges v. Sacred Heart St. Mary's Hospitals, Inc., supra,* 164 F.3d at 1059. The arbitrator is likely to have a better understanding of the meaning of "work" in the context of a specific bargaining relationship than a court would have, cf. *Tice v. American Airlines, Inc.,* 288 F.3d 313, 317-18 (7th Cir. 2002), and so if the statutory and contractual standards are identical, the arbitrator's decision is entitled to consideration in a follow-on FLSA case. That will mitigate though not eliminate the two-bites-at-the-apple problem that arises when the standard in the collective bargaining agreement is the same as that in the Fair Labor Standards Act.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 05 C 4234

[Filed July 30, 2007]

PETER JONITES, individually and on behalf of all others similarly situated, *et al.*,	)
Plaintiff,	)
v.	)
EXELON CORPORATION, a Pennsylvania corporation, *et al.*,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Before this Court is Defendants' motion for summary judgment against Plaintiff Class and individual Plaintiffs. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED.

I. FACTS

Plaintiffs are current and former hourly employees subject to receiving callouts under Defendant Commonwealth Edison's ("ComEd") "Automated Response Call Out System" (ARCOS) and ComEd's minimum response rate expectations. ComEd is an electric utility company responsible for maintaining more than 78,000 miles of power lines in Northern Illinois and providing service to the third largest metropolitan area in the United States. There are six different regions in the ComEd service territory, with each region further divided into smaller geographic zones. Each zone has one or more local areas or "barns" where employees report to work. Defendant Exelon Business Service Company ("BSC") provides "corporate governance services" to Defendant Exelon Corp. and to ComEd, which involves "compensation and benefits" policies.

Plaintiffs are subject to "call-outs", where they are asked to return to work when additional manpower is needed to address emergency work conditions such as weather-related outages, interruptions in customer service, or outages or immediate dangers caused by equipment failures. A "callout" or "call back" refers to a circumstance where the employee has left ComEd's premises or work site, but then returns to his reporting location after being notified of work that needs to be performed immediately because of an emergency condition.

The CBA

Plaintiffs are hourly workers and were represented by International Brotherhood of Electrical Workers Local 15 for collective bargaining purposes. Local 15 entered into a collective bargaining agreement ("CBA") with ComEd, Exelon Corp. and BSC. Article IV of the CBA, entitled "Hours of Work, Overtime and Holidays," defines the "basic work week" and terms under which employees receive overtime, which is paid at a rate of "time and one-half" for all hours worked outside of an employee's normally scheduled, eight hour "basic workday."

The CBA defines the basic work day as a period that "shall normally consist of eight hours of work which shall be consecutive except when time out for meal is scheduled."Art. IV, para. 1, p. 13. Further, "during the regularly scheduled working day, there shall be a regularly scheduled meal period not to exceed one hour, except for employees whose work requires them to work on duty eight hours consecutively, in which case they shall eat at their work location." CBA, Article IV, para. 21, p. 20. Employees who are scheduled to work an eight-and-one-half-hour day are entitled to receive an unpaid lunch under the terms of the CBA.

Article IV of the CBA provides that employees are paid for travel time if they must travel from their normal reporting location, or barn, to a work location. Para. 20. However, employees are not paid for time spent commuting to and from work locations within their working area. CBA, Article IV, para. 20. The CBA further provides that an employee ordered to

remain at a specific location, awaiting a call for emergency work outside scheduled working hours, shall be paid at the applicable rate until release. Article IV, para. 16. The CBA provides that employees who are "called back (with or without previous notice) for work at any time outside of their regular work schedule shall be paid a minimum of two hours straight time pay and call-back allowance of two hours straight time work" unless the time worked amounts to eight hours or more, in which case employees do not receive the call-back allowance. Article IV, para. 18, p. 19.

Article VIII of the CBA provides for an arbitration procedure by an impartial Arbitrator for disputes arising from the CBA that cannot be resolved internally.

ARCOS

In July 2003, ComEd began using an automated computer program, ARCOS, to expedite the callout process and improve callout response rates. ARCOS allows employees to input up to three contact numbers, including cell phones and pagers, as well as other temporary numbers where they can be reached in the event of a callout. ARCOS contacts employees by calling up to three contact numbers. If the employee answers the call, he or she may choose to either "accept" or "decline" the callout. Employees may also input "on the fly" (temporary contact numbers) into ARCOS if they want to be reached at a different number than the up to three already placed into ARCOS. If an employee does not answer an ARCOS call, the reason is noted and a message is left for the

employee. The system then continues to call employees in the order of the callout list, until the requisite number of employees accept the callout.

Employees who do not answer the call have a minimum period of 20 minutes, starting from the time they receive the first ARCOS call, to call back the system and accept or decline the callout. If an employee initially "declined" an opportunity, he or she may contact ARCOS within the 20 minutes to "accept" the callout. If the employee does not respond to the callout after that time, it is generally considered a "decline." However, if the employee calls ARCOS back after the 20-minute acceptance period but before the callout need has been satisfied, the employee may still accept the callout and receive credit for it. When an employee accepts an ARCOS callout, an employee has at least two hours from that time to physically report to their barn, or normal reporting location. Plaintiffs cannot determine whether or when callouts using ARCOS will occur, and ARCOS callouts are not uniformly distributed over time.

ARCOS allows for conditions under which employees are not eligible to receive callouts. ARCOS reports callouts as "excused" and not counted for purposes of total response rate, when employees are "coded" in the payroll system as already working, entitled to a "rest period," on vacation, sick or on a leave of absence.

ARCOS instituted minimum callout response and acceptance rates. Response rates are the frequency to which employees respond to the calls–either declining or accepting the callout. Acceptance rates are the

frequency to which employees accept callouts. Minimum response and acceptance rates varied depending on the job and time period. Prior to April 2005, the highest required response rate was 50%, and the highest required acceptance rate was 10%, for employees who received five or more callouts per quarter. In April 2005, ComEd reduced its stated response requirements from 50% to 25%, and instituted 35% as the highest acceptance rate required. When these minimum percentages were not met, progressive disciplinary action was taken.

Since the implementation of ARCOS, Plaintiffs have engaged in various personal activities, including remodeling existing homes, coaching sports events, visiting friends and families, taking vacation and day trips, camping, hunting, fishing, performing household activities, participating in community events, going to movies and restaurants, attending weddings, watching television, etc. The Representative Plaintiffs had either cell phones or could have obtained cell-phone numbers to input into ARCOS since 2003. Some employees, such as Crew Leaders and "fault team" members, have company issued cell phones. To the extent that some Representative Plaintiffs did not have cell phones, it was admittedly a personal choice by the individual.

ComEd's Contractor Policy Regarding Former Employees Terminated for Cause

ComEd maintains a policy prohibiting former employees who have been terminated "for cause" from working on its property or projects as independent contractors. Individual contractors may hire former

ComEd employees terminated for cause, but these employees may not work on a ComEd project or on ComEd property.

In January 2006, Matt Turk, Vice President of Operations at Trench-It Inc., an independent contractor for ComEd, reassigned Plaintiff Michael Hisel, a former ComEd employee terminated under ComEd's callout expectations policy, to a non-ComEd project. Turk then asked ComEd to make an exception to the contractor policy to allow employees who had been terminated for failing to accept callouts to continue to work for Trench-It, Inc. ComEd declined to change the policy.

Procedural History

When employees began receiving progressive discipline under ARCOS, the Union filed multiple ARCOS-related grievances to contest ComEd's right to implement ARCOS and challenged the disciplinary actions employees had received. The parties were unable to resolve their differences and submitted the dispute to an impartial arbitrator, as required by the CBA. The arbitrator heard the matter in December 2005. The Arbitrator found that the ARCOS system was reasonable and did not violate the CBA.

In May 2005, the union challenged the Award by filing an action in the United States District Court for the Northern District of Illinois, claiming that the Arbitrator erred as a matter of law. On September 30, 2005, the district court dismissed the action, finding that the Arbitrator stayed within the bounds of the

CBA and rejecting the argument that the Arbitrator's decision was contrary to public policy.

On July 22, 2005, the instant case was removed from Illinois Circuit Court to this court. In the instant case, Plaintiff Class alleges the following counts in its Third Amended Complaint. Count I–Violation of Fair Labor Standards Act and Willfulness: Plaintiff Class claims that it is entitled to compensation under the FLSA for all hours worked, including time spent while "engaged to wait" on call, traveling in response to a call-out, and during their meal time. Count II–Willful Violation of Fair Labor Standards Act and Willfulness: Plaintiff Class alleges the same claims as Count I, and further contends that Defendants' behavior was intentional. Count III–Liquidated Damages Under the FLSA: Plaintiff Class seeks liquidated damages for hours worked as outlined in Count I. Count IV–Illinois Wage Payment and Collection Act: Plaintiff Class seeks compensation under the Illinois Wage payment and Collection Act for overtime worked as alleged in Count I. Count V–Illinois Minimum Wage Law: Plaintiff Class seeks compensation for Defendants' failure to pay Plaintiff Class the minimum wage prescribed by 820 ILCS § 105/4(a). Count VI–Unlawful Retaliation Count in Violation of FLSA: Plaintiff class seeks compensation, alleging retaliation.

On April 16, 2007, Defendants filed the instant motion for summary judgment. Defendants moved for summary judgment on compensation claims arising out of Plaintiffs Class' "on call" time, meal time, and travel time, as well as Plaintiff Class' claim that Defendants incorrectly calculated regular rate of pay, and illegally retaliated against Plaintiffs.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, show there is no genuine issue of fact. Such a showing entitles the moving party to judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 720 (7th Cir. 2004). A genuine issue of material fact exists only when a reasonable factfinder could find for the nonmoving party, based on the record as a whole. The court does not weigh the evidence and it does not make credibility determinations. Instead, the court makes all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 436 (7th Cir. 2000). If a party fails to present proof on an essential element of his or her case, then all other facts become necessarily immaterial. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 509 (7th Cir. 1999).

III. ANALYSIS

A. Meal Period Compensation

Defendants move for summary judgment for the meal compensation claim on the ground that the CBA bars the FLSA claim under Seventh Circuit precedent. In *Leahy v. City of Chicago*, the Seventh Circuit held that the collective bargaining agreement precluded the FLSA claim, where the collective bargaining agreement fully protected the appellants' FLSA rights.

96 F.3d 228 (7th Cir. 1996). In *Leahy*, the collective bargaining agreement between the police officers and the city clearly stated that an officer was entitled to overtime rates for hours worked in excess of eight hours per day. *Id.* The Seventh Circuit then found that if an officer worked more than eight hours in a day as a result of working during a meal period, the employer was required to pay the officer overtime rates for the excess work time. *Id.* The court noted that under the collective bargaining agreement, it is assumed that an officer is generally not working during a meal period that exceeds the eight hour work day, and should be appropriately compensated if an officer actually does work during the meal. *Id.* at 232.As to whether the meal period was compensable itself, the Seventh Circuit held that individual inquires under the collective bargaining agreement's grievance process, and not the federal courts, "is the most efficient way to determine whether an officer's meal period should be compensable work time." *Id.* Over a strong dissent, the majority opinion in *Leahy* concluded that a collective bargaining agreement's overtime provision for overtime pay above the eight hours per day work schedule, together with a grievance and arbitration procedure that can address disputes over what constitutes compensable work, was sufficient to preclude a FLSA claim.

The majority opinion in *Leahy* did not mention the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (U.S. 1981). In *Barrentine*, the Supreme Court reversed the Eight Circuit's ruling that submitting a wage claim to a CBA

arbitration process barred the bringing of a FLSA claim. *Id.* at 745. The Supreme Court held that

> The FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable. Because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures.

Id. at 745.

The Seventh Circuit was presumably aware of the *Barrentine* decision when it decided *Leahy*. Against this backdrop, this court must read the Seventh Circuit's ruling narrowly. Judge Plunkett of this district has suggested that a "reasonable interpretation is that it is appropriate for employers and employees who define compensable work in their CBA to resolve disputes about the issue through the CBA's grievance procedure." *Schwertfeger v. Vill. of Sauk Vill.*, 2001 U.S. Dist. LEXIS 3516 (D. Ill. 2001). However, *Leahy* does not require that the CBA define compensable work. In fact, *Leahy* specifically leaves this issue to arbitration procedures, noting that preclusion of the FLSA claim "makes perfect sense in situations where it is difficult to define precisely what

constitutes working time." *Leahy* at 232. While this court recognizes the tension that exists between *Leahy* and the Supreme Court's ruling that employees should have access to federal court, and not be confined solely to the arbitration process through their labor union, this court is properly bound by the majority decision in *Leahy,* and any inconsistency between *Leahy* and *Barrentine* is properly addressed to the Seventh Circuit.

In the present case, the CBA provides that "the basic workday shall normally consist of eight hours of work which shall be consecutive except when time out for a meal is scheduled." CBA, Article IV, para. 1. It is clear from the language that the meal period is not considered "work time," as it was separated out from the consecutive work time. Further, Article IV, para. 13 of the CBA provides that if employees work more than eight hours per day, they shall be paid at time and one-half for all hours worked outside of the scheduled hours. Thus, under the CBA if an employee were to work more than eight hours a day as a result of working during a meal period, the employee should receive time and one-half pay for the extra hours worked.

This still leaves the question of whether the meal period should be compensable work time. At issue is whether this inquiry should be left to the individual arbitration procedures set forth in Article VIII of CBA, as *Leahy* dictates, or whether the inquiry of what constitutes compensable work can be taken up by the federal court. In *Leahy,* the Seventh Circuit concluded that individual arbitration under the CBA should be used, because it was "the most efficient way to

determine whether an officer's meal period should be compensable work time ... [give] a police department of some 12,000 officers in different districts with different shift schedules and different exigencies arising each day that might affect officers' meal periods." In the present case, Plaintiffs are employees of ComEd, an electric utility company responsible for maintaining power lines in Northern Illinois. There are six different regions in the ComEd service territory, with each region further divided into smaller geographic zones. Each zone has one or more local areas or "barns" where employees report to work and where company equipment, including vehicles, are stored. Like *Leahy*, the ComEd policy is applied in different "districts" or "zones", with different schedules and exigencies that may arise each day. The efficiency reasoning in *Leahy* applies to the present case. Where the Seventh Circuit has concluded that the collective bargaining agreement's overtime provision, together with a grievance and arbitration procedure, was sufficient to preclude a FLSA claim, there is no genuine issue of material fact that the provisions under the CBA at issue satisfy the *Leahy* standard for FLSA preclusion. Therefore, Defendant's motion for summary judgment as to meal period compensation is granted.

B. Travel Time Compensation

Defendants move for summary judgment on the grounds that the CBA precludes Plaintiff Class' travel compensation claim, and further, the claim fails under the FLSA. Defendants rely on *Leahy* and the same arguments above in asserting that the CBA bars the FLSA claim. Given the *Barrentine* reasoning and decision, *Leahy* must not be read too broadly. To

interpret *Leahy* as setting a blanket rule that any employee covered by a CBA with an overtime provision is barred from bringing any FLSA claim is too broad. This court declines to extend the reach of *Leahy* beyond the meal compensation claim.

The CBA provides that employees "required to report directly to a work a work location within their working area shall travel to such work location on their own time and at their own expense." Article IV, para. 20. At issue is whether travel time to their regular work location for a callout, outside of regular working hours, is compensable. Under the FLSA, normal travel from home to work is not work time. 29 CFR 785.35. "There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time." 29 CFR 785.36. However, "the Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his *regular place of business* to do a job is working time." *Id.* (Italics added). Under federal policy, "such time will no longer be counted as hours worked." The U.S. Department of Labor's Field Operations Handbook, Ch. 31, 31c06(b), Rev. 643 (Dec. 15, 2000). That is, when an employees is called outside of regular hours to travel a "substantial distance" to perform an emergency job, the travel time is working time. However, if an employee is called outside of regular hours to travel to the same, regular place of work, that travel time is not counted as work time.

There is no dispute that when Plaintiffs accept ARCOS callouts, they report to their designated "barns" or normal reporting location first. They are then sent out to the emergency work sites, and are paid for the travel time between their barns and the work sites. The travel time in question is Plaintiff's travel time to their regular place of work for emergency ARCOS callouts. Under the FLSA and federal labor policy, this travel time to their regular place of work is not considered compensable work time, even if done outside of regular work hours. Therefore, Defendant's motion for summary judgment is granted as to the travel compensation claim.

C. On-Call Compensation

Defendant's move for summary judgment on the grounds that the CBA precludes Plaintiff Class' on-call compensation claim, and further, the Plaintiff Class is not entitled to compensation for on-call time under the FLSA. For the same reasons stated in the preceding section, Plaintiff Class' on-call compensation claim under the FLSA is not precluded by the CBA.

Under the FLSA, working more than 40 hours per week draws premium pay. 29 U.S.C. § 207. At issue is whether hours spent "on call" should be treated as work. According to the Supreme Court, the answer depends on whether one has been "engaged to wait" or is "waiting to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134 (U.S. 1944); 29 CFR 785.14.

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his

> own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

29 CFR 785.17. The Seventh Circuit has stated that the "regulatory question is whether the employee can 'use the time effectively for personal pursuits'–not for all personal pursuits, but for many." *Dinges v. Sacred Heart St. Mary's Hosps.*, 164 F.3d 1056, 1058 (7th Cir. 1999). In *Dinges*, the Seventh Circuit reasoned that if an employee is allowed to remain at home, but is called away every few hours, he cannot use his time "effectively" for personal pursuits. *Id.* However, where employees "experience less than a 50% chance that there will be any call in a 14-16 hour period, so their time may be used effectively at home and around [the city]," the on-call time did not constitute work time. *Id.* The Seventh Circuit found that a 46% response rate to callouts was sufficient to allow for personal pursuits.

In the present case, under the ARCOS call-out system, employees are called for emergency electricity outages or other emergent situations. ARCOS allows employees to input up to three contact numbers, including cell phones and pagers. Employees may also input temporary contact numbers into ARCOS. Call-outs are location and job-position specific, and employees are called in inverse order of their total hours of overtime worked based on their barn's overtime lists. If the employee answers the call, he or she may chose to either "accept" or "decline" the callout. Employees who do not answer the call have a

minimum of 20 minutes to call the system back and accept or decline the callout. If the employee does not respond to the callout after that time, it is generally considered a "decline." When an employee accepts an ARCOS callout, an employee has at least two hours from that time to physically report to their barn, or normal reporting location.

During their on-call time, Plaintiffs have engaged in various personal activities, including remodeling existing homes; coaching, or otherwise participating in their children's sporting events; visiting friends and family; taking vacations and day trips; camping, hunting and fishing; performing numerous household activities, going to movies and restaurants; watching sports games; as well as a host of other personal activities. The number of call-outs varies depending on the job classification. Most positions received fewer than five chargeable callouts during each three-month quarter. The highest call out average was 16.3 days in a 90-day period. The maximum average call-out was thus one callout per 5.52 days. Further, employees were required to accept at most 35% of the callouts at any given period. That is, they were allowed to decline at least 65% of the calls received without incurring disciplinary action.

These circumstances certainly do not amount to receiving a call "every few hours," which the Seventh Circuit found was too intrusive to allow for personal pursuits. On average, the Plaintiffs were not called every day, were allowed to ignore 50% and decline 65% of their calls, and were given two hours upon acceptance to travel to the regular workplace. Further, Plaintiffs were allowed to use cell phones and pagers,

allowing mobility away from home and allayed the necessity of remaining by a phone. See *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182 (10th Cir. 1989). ARCOS also allowed for "excused time," where Plaintiffs may indicate beforehand that they would not be available for contact due to approved vacation, sickness, overtime rest period, military leave, death in the family, or if they are already working. Thus, Plaintiffs were not limited to their home, much less the work place by the ARCOS system. Plaintiffs were free to, and in fact did, engage in family, recreational and personal activities. Under the facts presented, and given the Seventh Circuit precedent, this court finds that there is no genuine issue of material fact that the Plaintiff Class could, and did, use their time effectively for personal pursuits. Defendant's motion for summary judgment as to call-out time is granted.

D. Calculation of the Regular Rate of Pay

Defendants move for summary judgment on Plaintiffs Class' claim that ComEd incorrectly calculated the regular rate of pay. There seems to be some confusion as to what compensation Plaintiffs' regular rate of pay claims were directed. Defendants identified two areas of compensation: (1) contractual premiums paid for hours worked outside an employee's regular shift (including working on the weekend), and (2) the callback allowance. Plaintiff Class further alleges that Defendants did not properly include the annual bonus and meal allowance in the calculation of regular rate. As to these latter issues, Plaintiff Class raises the annual bonus and meal allowance claims for the first time in their Response to Defendants' motion

for summary judgment. It is settled law that "a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir. 1996). Therefore, Plaintiff Class' regular rate of pay claims as to annual bonus and meal allowances are not properly before this court. This court will only address the regular rate of pay claims as to overtime work and the callback allowance.

The FLSA defines "regular rate" as all remuneration for employment paid to, or on behalf of, the employee, except

> (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;
> (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;
> (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work

> outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) [)], where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek

29 USCS § 207(e). Under the FLSA, an employer is not required to include work done in excess of the 8-hour work-day in the regular rate of pay, including premiums paid for work on the weekends, provided that the premium is at least one-and-one-half times the rate established for like work done in non-overtime work. There is no evidence that Defendants paid employees less than one-and-one-half times the regular rate of pay for overtime work, nor does Plaintiff Class address this issue in its response brief. To the contrary, the CBA provides that employees receive overtime at a rate of "time and one-half" for all hours worked outside of an employee's normally scheduled, eight hour "basic workday." Overtime premiums that pay at least one-and-one-half times the regular rate of pay are not required to be included in the regular rate of pay under the FLSA. Thus, to the extent that Plaintiff Class claims that Defendants incorrectly calculated the regular rate of pay in violation of the FLSA by failing to include contractual premiums for hours worked outside the regular shift, including weekends, summary judgment is granted for the Defendants.

Plaintiff Class also claims that Defendants incorrectly calculated the regular rate of pay by failing to include the callback allowance. The callback allowance provides that employees "called back for work at any time outside of their regular work schedule shall be paid ... two hours straight time pay." CBA § 18, p. 19. The callback allowance is not paid for actual hours worked, but rather is paid to compensate the employee for showing up to work. At issue is whether such "show up" time is included in the regular rate of pay under the FLSA. Plaintiffs rely on 29 C.F.R. §778.223 in claiming that such "show up" pay constitutes "compensation for performing a duty involved in the employee's job" and not excludable under 29 U.S.C. 207(e). Defendants argue that the callback allowance falls under 29 U.S.C. §207(e)(2), where "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause" is excludable from the regular rate of pay. The U.S. Department of Labor has stated in an Opinion Letter that "employees may, under employment agreements, be guaranteed at least 4 hours' pay for report to work, or for being called back to work outside their scheduled hours. If employees work only two hours but are paid for four hours, the pay for the two hours not worked is not considered to be compensation for working time and may be excluded from the regular rate of pay under § 7(e)." Call-Back Pay Plan, Op. Letter, U.S. Department of Labor, Office of Enforcement Policy, June 23, 1998. "Call back" time typically "consists of a specified number of hours of pay" in compensation for responding to calls from their employer to perform extra work. Call back time is not dependent on hours worked, but rather compensates

the employee for showing up to a call-out. According to the Department of Labor, this type of compensation is excludable from the regular rate of pay. *Id.* This is specifically contrasted with "on call" time, where employees are paid for specific hours worked while "on call". "On call" compensation is not excludable from the regular rate under §7(e) of the FLSA. *Id.* In the present case, there is no dispute that under the callback allowance Plaintiffs receive two hours straight time pay that has no relation to time worked. This allowance falls under the "callback" payment, where the compensation is for showing up, not for hours worked. As such, the callback allowance is excludable from the regular rate of pay under the FLSA. Summary judgment is granted to the Defendants as to the callback allowance.

E. Individual Retaliation Claims

Defendants move for summary judgment on the individual retaliation claims on the ground that Plaintiffs cannot establish a prima facie case of retaliation. Under the Section 215(a)(3) of the FLSA, it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed a complaint or instituted or caused to be instituted any proceeding under [the FLSA]." To establish a retaliation claim under the FLSA, an employee must show that his employer engaged in retaliatory conduct, either through the direct or indirect method of proof. *Cichon v. Exelon Generation Co., LLC,* 401 F.3d 803, 810 (7th Cir. 2005). To establish a prima facie case of retaliation, an employee must demonstrate that 1) she is a member of a protected class (or performed the protected act of filing

a complaint), 2) she is qualified for the position or, if already employed, has met the defendant's legitimate work expectations, 3) the defendant took adverse employment action against her and 4) the defendants treated similarly situated employees outside of the protected class (or who did not complain) more favorably. *Volovsek v. Wis. Dep't of Agric., Trade, & Consumer Prot.*, 344 F.3d 680, 692 (7th Cir. 2003).

Plaintiffs' sole argument for retaliation is that Plaintiffs Puleo and Hisel were terminated for refusing to participate in the ARCOS call-out requirements. Plaintiffs contend that since ARCOS call-out system violated the FLSA, termination for refusal to comply with the alleged illegal policy under ARCOS constituted an adverse employment action. This court has ruled that the ARCOS call-out system comports with the FLSA, as the system allowed employees to use their on-call time effectively for personal pursuits. Meeting the minimum response and acceptance requirements under ARCOS is thus a legitimate work expectation. Failure to participate in the ARCOS call-out system shows that Plaintiffs did not meet their employer's legitimate work expectations. As such, Plaintiffs fail to establish prong (3) of the prima facie requirements for retaliation. Defendants' motion for summary judgment as to retaliation is granted.

F. Section 301 Preemption

Section 301 of the LMRA, which provides that suits for violation of contracts between an employer and a labor organization confer original jurisdiction in federal district courts, has complete preemptive force. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (U.S.

1987); *Atchley v. Heritage Cable Vision Assocs.*, 101 F .3d 495 (7th Cir. 1996). If the resolution of a state law claim depends on the meaning of, or requires the interpretation of, a collective bargaining agreement, the application of state law is preempted and federal labor law principles must be employed to resolve the dispute. *Id.* Even if explicit terms of the collective bargaining agreement may not be on point, it is a matter of federal contract interpretation whether the words of a collective bargaining agreement create implied rights. *Id.* Although the preemptive effect of § 301 is broad, preemption does not occur in every situation where a collective bargaining agreement comes into play. *Id.* "When the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.; Livadas v. Bradshaw,* 512 U.S. 107 (U.S. 1994).

In the present case, the meal time, travel time, on-call time and regular rate of pay compensation disputes center on interpretation of the CBA. Article IV of the CBA addresses meal time compensation (para. 21-23), travel time compensation (para. 20), on-call time (para. 16) and regular rate of pay compensation (para. 1-6 overtime premiums and shift differentials, para. 13-15 overtime outside regular work periods, para. 18 callback allowance). Because the CBA's provisions address each of these disputes, interpretation of the meaning of the provisions is required. For example, para. 16 of Article IV states that "an employee ordered to remain at a specified location, awaiting a call for emergency work outside scheduled working hours, shall be paid the applicable

rate until release." FLSA and federal labor law principles must be used to interpret whether the Plaintiffs were required to "remain at a specified location" and "engaged to wait." Under such circumstances, federal labor law principles are employed to interpret and resolve the dispute. Plaintiff Class' state law claim for overtime under Count IV of the Third Amended Complaint is preempted.

Plaintiff Class further raises a claim seeking compensation for Defendants' failure to pay Plaintiffs the minimum wage prescribed by 820 ILCS § 105/4(a). From the facts presented, this court understands the dispute to be not centered on the actual hourly-wage set, but on whether Plaintiffs were paid for all hours worked. Plaintiff Class' argument, as this court understand it, is that Plaintiffs were not paid for all hours worked, and thus their pay fell below the minimum wage. Again, this dispute goes to whether meal time, travel time, and on-call time were considered compensable work time, and whether the regular rate of pay was correctly calculated. As discussed above, these disputes require interpretation of Article IV provisions of the CBA. Plaintiff Class' minimum wage state law claim (Count V of the Third Amended Complaint) is preempted.

G. Proper Defendants

Because summary judgment as been granted in favor of the Defendants, and against the Plaintiffs, on the merits, the issue of proper defendants is moot.

IV.CONCLUSION

For the reasons stated above, Defendant's motion for summary judgment is GRANTED. Because summary judgment is granted as to meal compensation, travel compensation and on-call time compensation under the FLSA, Counts I, II, and III of the Third Amended Complaint are dismissed. Count IV and V are dismissed as preempted by federal labor law. Because summary judgment is granted as to the retaliation claim, Count VI of the Third Amended Complaint is dismissed. This case is closed.

/s/David H. Coar
David H. Coar
United States District Judge

Dated: July 30, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 05 C 4234

[Filed July 30, 2007]

Jonites, et Al.,	)
	)
v.	)
	)
Exelon, et al.,	)
	)

JUDGMENT IN A CIVIL CASE

- Decision by Court.

IT IS HEREBY ORDERED AND ADJUDGED that summary judgment is granted in favor of the Defenants, Exelon, et al, and against the Plaintiff Class, Jonites, et al. Civil case terminated.

Michael W. Dobbins, Clerk of Court

/s/ Patricia McQurter-Figgs, Deputy Clerk

Date: 7/30/2007

APPENDIX C

United States Code
Title 29. Labor
Chapter 7. Labor-Management Relations
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the

United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

United States Code
Title 29. Labor
Chapter 8. Fair Labor Standards

29 U.S.C. § 201. Short title

This chapter may be cited as the "Fair Labor Standards Act of 1938".

29 U.S.C. § 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such

industries without substantially curtailing employment or earning power.

29 U.S.C. § 203. Definitions

As used in this chapter--

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the[1] Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

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[1] So in original. Probably should be preceded by "in".

(ii) who--

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4) (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal

fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under

the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be

included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee,

except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.

Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons--

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services

of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that--

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital,

institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States

(including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 204. Administration

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) Appointment, selection, classification, and promotion of employees by Administrator

The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) Principal office of Administrator; jurisdiction

The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) Biennial report to Congress; studies of exemptions to hour and wage provisions and means to prevent curtailment of employment opportunities

(1) The Secretary shall submit biennially in January a report to the Congress covering his activities for the

preceding two years and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent. Such report shall also include a summary of the special certificates issued under section 214(b) of this title.

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 213 of this title, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first

report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 214 of this title.

(e) Study of effects of foreign production on unemployment; report to President and Congress

Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: Provided, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this chapter as he may determine to be pertinent to such report.

(f) Employees of Library of Congress; administration of provisions by Office of Personnel Management

The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to

provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Regulatory Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 216(b) of this title.

29 U.S.C. § 205. Repealed. Pub.L. 110-28, Title VIII, § 8103(c)(1)(A), May 25, 2007, 121 Stat. 189

29 U.S.C. § 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions

under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(4) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(5) Redesignated (4)

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments

of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

(c) Repealed. Pub.L. 104-188, [Title III], § 2104(c), Aug. 20, 1996, 110 Stat. 1929

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an

employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41

U.S.C.A. § 351 et seq.], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee--

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 U.S.C.A. § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C.A. § 401 et seq.], or

(2) who in any workweek--

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

(g) Newly hired employees who are less than 20 years old

(1) In lieu of the rate prescribed by subsection (a)(1) of this section, any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

(3) Any employer who violates this subsection shall be considered to have violated section 215(a)(3) of this title.

(4) This subsection shall only apply to an employee who has not attained the age of 20 years.

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production

of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and

controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand

and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums[1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the

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[1] So in original. Probably should not be capitalized.

employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,[2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate

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[2] So in original. Probably should have closed parentheses.

ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract,

or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates

have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of

fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if

lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not

for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding

arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3) (A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation

shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher[3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the

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[3] So in original. Probably should be followed by a period.

request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation

duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of

the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

29 U.S.C. § 208. Repealed. Pub.L. 110-28, Title VIII, § 8103(c)(1)(A), May 25, 2007, 121 Stat. 189

29 U.S.C. § 209. Attendance of witnesses

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction,

powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

29 U.S.C. § 210. Court review of wage orders in Puerto Rico and the Virgin Islands

(a) Any person aggrieved by an order of the Secretary issued under section 208 of this title may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (including provision for the payment of an appropriate minimum wage rate), or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence

may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

29 U.S.C. § 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C. § 212. Child labor provisions

(a) Restrictions on shipment of goods; prosecution; conviction

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced

in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: And provided further, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) Investigations and inspections

The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor.

(c) Oppressive child labor

No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(d) Proof of age

In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.

29 U.S.C. § 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of

executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine

products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to--

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C.A. § 181 et seq.]; or

(4) Repealed. Pub.L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub.L. 93-259, § 21(b)(3), Apr. 8, 1974, 88 Stat. 68

(8) Repealed. Pub.L. 95-151, § 14(b), Nov. 1, 1977, 91 Stat. 1252

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard

metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing

of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the

same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub.L. 93-259, §§ 15(c), 16(b), Apr. 8, 1974, 88 Stat. 65

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub.L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249

(23) Repealed. Pub.L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children--

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub.L. 95-151, §§ 6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and

one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of Title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee--

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4) (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that--

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that--

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other

terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5) (A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors--

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i) (I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that--

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports--

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide--

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17

years of age may drive automobiles or trucks on public roadways only if--

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve--

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the

purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7) (A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee

engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin

Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C.A. § 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who--

(1) is employed by such employer--

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who--

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks--

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

29 U.S.C. § 214. Employment under special certificates

(a) Learners, apprentices, messengers

The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) Students

(1) (A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 of this title or not less than $1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed--

(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this chapter before the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month

of the immediately preceding twelve-month period, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term "student hours of employment" means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or

order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 206(a)(5) of this title or not less than $1.30 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 of this title or not less than $1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4) (A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this

subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed six--

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing

students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate.

(D) To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only--

(i) a listing of the name, address, and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

(c) Handicapped workers

(1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are--

(A) lower than the minimum wage applicable under section 206 of this title,

(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

(2) The Secretary shall not issue a certificate under paragraph (1) unless the employer provides written assurances to the Secretary that--

(A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and

(B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced

nonhandicapped individuals employed in the locality for essentially the same type of work.

(3) Notwithstanding paragraph (1), no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection in effect on June 1, 1986, of any handicapped individual for a period of two years from such date without prior authorization of the Secretary.

(4) Nothing in this subsection shall be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients.

(5) (A) Notwithstanding any other provision of this subsection, any employee receiving a special minimum wage at a rate specified pursuant to this subsection or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. An employee or the employee's parent or guardian may file such a petition for and in behalf of the employee or in behalf of the employee and other employees similarly situated. No employee may be a party to any such action unless the employee or the employee's parent or guardian gives consent in writing to become such a party and such consent is filed with the Secretary.

(B) Upon receipt of a petition filed in accordance with subparagraph (A), the Secretary within ten days shall assign the petition to an administrative law judge appointed pursuant to section 3105 of Title 5. The administrative law judge shall conduct

a hearing on the record in accordance with section 554 of Title 5 with respect to such petition within thirty days after assignment.

(C) In any such proceeding, the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.

(D) In determining whether any special minimum wage rate is justified pursuant to subparagraph (C), the administrative law judge shall consider--

(i) the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured; and

(ii) the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity.

(E) The administrative law judge shall issue a decision within thirty days after the hearing provided for in subparagraph (B). Such action shall be deemed to be a final agency action unless within thirty days the Secretary grants a request to review the decision of the administrative law judge. Either the petitioner or the employer may request review by the Secretary within fifteen days of the date of issuance of the decision by the administrative law judge.

(F) The Secretary, within thirty days after receiving a request for review, shall review the record and either adopt the decision of the administrative law judge or issue exceptions. The decision of the administrative law judge, together with any exceptions, shall be deemed to be a final agency action.

(G) A final agency action shall be subject to judicial review pursuant to chapter 7 of Title 5. An action seeking such review shall be brought within thirty days of a final agency action described in subparagraph (F).

(d) Employment by schools

The Secretary may by regulation or order provide that sections 206 and 207 of this title shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.

29 U.S.C. § 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with

knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

29 U.S.C. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment

of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by

an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of

subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) (1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed--

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means--

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or

mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the

penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of Title 29. Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.

VALIDITY OF SUBSEC. (B)

<The United States Supreme Court, in Alden v. Maine, 119 S.Ct. 2240, 144 L.Ed.2d 636, June 23, 1999, found that the powers delegated to Congress under Article I of the Constitution did not include the power to subject nonconsenting states to private suits for damages in state courts, as authorized by subsec. (b) of this section.>

§ 216a. Repealed. Oct. 26, 1949, c. 736, § 16(f), 63 Stat. 920

§ 216b. Liability for overtime work performed prior to July 20, 1949

No employer shall be subject to any liability or punishment under this chapter (in any action or proceeding commenced prior to or on or after January 24, 1950), on account of the failure of said employer to pay an employee compensation for any period of

overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had subsections (d)(6), (7) and (g) of section 207 of this title been in effect at the time of such payment.

29 U.S.C. § 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

29 U.S.C. § 218. Relation to other laws

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance

establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law--

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

29 U.S.C. § 219. Separability

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

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29 U.S.C. § 251. Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross

inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the

general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey [41 U.S.C.A. § 35 et seq.] and Bacon-Davis [40 U.S.C.A. § 276a et seq.] Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

29 U.S.C. § 252. Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act

(a) Liability of employer

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.] (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either--

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) Compensable activity

For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) Time of employment

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], of the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or of the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) Jurisdiction

No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], under the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or under the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], to the extent that such action or proceeding seeks to

enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) Assignment of actions

No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], which accrued prior to May 14, 1947, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b) of this section.

29 U.S.C. § 253. Compromise and waiver

(a) Compromise of certain existing claims under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, or the Bacon-Davis Act; limitations

Any cause of action under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], which accrued prior to May 14, 1947, or any action (whether instituted prior to or on or after May 14, 1947) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such

compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Waiver of liquidated damages under Fair Labor Standards Act of 1938

Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], to liquidated damages, in whole or in part, with respect to activities engaged in prior to May 14, 1947.

(c) Satisfaction

Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) Retroactive effect of section

The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) "Compromise" defined

As used in this section, the term "compromise" includes "adjustment", "settlement", and "release".

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947--

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are

incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either--

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such

contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], of the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or of the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 U.S.C. § 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]--

(a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years

after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947--may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

29 U.S.C. § 256. Determination of commencement of future actions

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant--

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear--on the subsequent date on which such written consent is filed in the court in which the action was commenced.

29 U.S.C. § 257. Pending collective and representative actions

The statute of limitations prescribed in section 255(b) of this title shall also be applicable (in the case of a collective or representative action commenced prior to May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.]) to an

individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after May 14, 1947. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.

29 U.S.C. § 258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. § 259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be--

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.]--the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.]--the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]--the Secretary of Labor.

29 U.S.C. § 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 261. Applicability of "area of production" regulations

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer--

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

29 U.S.C. § 262. Definitions

(a) When the terms "employer", "employee", and "wage" are used in this chapter in relation to the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], they shall have the same meaning as when used in such Act of 1938.

(b) When the term "employer" is used in this chapter in relation to the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.] or Bacon-Davis Act it shall mean the contractor or subcontractor covered by such Act.

(c) When the term "employee" is used in this chapter in relation to the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.] or the Bacon-Davis Act it shall mean any individual employed by the contractor or subcontractor covered by such Act in the performance of his contract or subcontract.

(d) The term "Wash-Healey Act"[1] means the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), as amended [41 U.S.C.A. § 35 et seq.]; and the term "Bacon-Davis Act" means the Act entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics employed by contractors and subcontractors on public buildings", approved August 30, 1935 (49 Stat. 1011), as amended.

(e) As used in section 255 of this title the term "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

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[1] So in original. Probably should be "Walsh-Healey Act".